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CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

(NOMINATION OF SUSAN W. LIEBELER)

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF SUSAN W. LIEBELER

AUGUST 6 AND NOVEMBER 3, 1987

Part 2

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NOMINATION OF SUSAN W. LIEBELER

THURSDAY, AUGUST 6, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy presiding.

Also present: Senators Thurmond, Specter, and Grassley.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. The Senate Judiciary Committee convenes this afternoon to take testimony on the nomination of Susan Liebeler to be a judge of the U.S. Court of Appeals for the Federal Circuit.

The nomination has raised some controversy, some deriving from the nominee's record in her present position as a member and, since 1986, as Chairman of the International Trade Commission. Other issues developed by the committee's background investigation are also going to require clarification.

So our purpose in this hearing is to give the nominee the opportunity to present her views on some of these controversies, and we will hear from no other witnesses this afternoon. The background investigation has raised issues and, out of fairness, obviously, we want to give the nominee the opportunity to speak herself.

The committee has received a number of letters from individuals and organizations that have varying perspectives on this nomination. We will include those communications in the record of these hearings and, of course, the nominee will have copies of those.

[See appendix.]

Senator LEAHY. We will also keep the hearing record open for further comments and for written questions from members of the committee who could not be present this afternoon.

The nominee has completed an extensive questionnaire on her background and experience. The publicly-available portions of those responses will also be included in the record.

[See appendix.]

Senator LEAHY. Now, we have asked the nominee to provide a great deal of documentation both from her personal records and from the files of the International Trade Commission.

I just want the record to reflect that Ms. Liebeler has responded very promptly and willingly to these requests. In fact, some of the requests have been very extensive. She has cooperated completely, and the committee appreciates that kind of cooperation.

I also understand that we have Senator Wilson from California and Senator Gramm from Texas here this afternoon. I am going to yield to my distinguished and senior colleague, Senator Thurmond, and to Senator Specter, and as soon as they have made whatever remarks they would like then, naturally, if Senator Wilson and Senator Gramm wish to speak, that will be fine.

Senator THURMOND. Thank you very much, Mr. Chairman. I do not have any opening statement except to say that from looking through the record of this lady, she appears well qualified for the position to which she has been appointed and I expect to support her nomination.

Senator LEAHY. I have just been advised of Senator Specter's connection to the nominee from Pennsylvania, and so, Senator Specter, I would yield to you to take over on the introductions.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Well, thank you very much, Mr. Chairman. I would like to present Commissioner Liebeler to the Judiciary Committee for her confirmation hearing today. Ms. Liebeler is a longstanding friend. Her husband, J. Wesley Liebeler, and I were younger lawyers together on the Warren Commission staff, going back more than 20 years ago.

Commissioner Liebeler is, in addition, a native of New Castle, PA, where a very large contingency presented themselves at an open-house town meeting which I held there on July 13, just a few weeks ago, to tell me about their strong support for Commissioner Liebeler for this judicial position.

Commissioner Liebeler has had a very distinguished academic record and has had a very distinguished public record. I note that she ranked near the top of her class, fourth out of 214, at the UCLA Law School, was Order of the Coif there, was a Stein scholar; that she has had a very distinguished professional career; that she has served on the International Trade Commission and currently chairs that Commission.

That position is a very difficult one and a controversial one, and in my capacity as a Senator representing Pennsylvania, a steel-producing State, I have appeared before the International Trade Commission and have argued for some assistance for the steel industry and have not met with success from Commissioner Liebeler, but there are differences of opinion on all sorts of matters. Even some U.S. Senators do not agree with each other all the time in our work.

There are, I think, legitimate areas of inquiry for the Judiciary Committee. I, for one, have been somewhat surprised to hear about the procedures of the International Trade Commission, which I have discussed with Commissioner Liebeler on an informal basis in terms of their procedures on the questions of consultation after arguments, the questions of circularizing of opinions, and so forth.

I know that there will be matters which will be inquired into by the Judiciary Committee and perhaps by the full Senate, but I do consider it a privilege to present Commissioner Liebeler here today for these confirmation proceedings.

Thank you very much, Mr. Chairman.

Senator **Leahy**. Thank you.

Ms. Liebeler, why do you not come forward along with Senator Wilson and Senator Gramm?

Gentlemen, which one of you wishes to go first?

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Wilson**. Mr. Chairman, I will claim that privilege. I very much appreciate the opportunity to appear before the committee—I was going to say to introduce Susan Wittenberg Liebeler, but my distinguished colleague from Pennsylvania has quite rightly preempted that.

But it is my pleasure to appear before you today to bring to you, I think, a very distinguished candidate. Her record makes clear just from its own facts that Susan Liebeler has had a very distinguished legal career.

While she grew up in Pennsylvania, she did have the good sense to come to California to attend the prestigious law school at the University of California at Los Angeles. Upon graduation—and she graduated with distinction, fourth in her class, receiving membership in the Order of the Coif—she stayed on in California to serve as a law clerk and then was there in private practice.

After a short detour, Mr. Chairman, to Vermont, she then began 12 years of teaching law as a professor at Loyola Law School in Los Angeles. During her time at Loyola, she taught courses in corporations, securities law, financial institutions, and a number of other areas of the law.

She obviously impressed a great many people in California because she has received endorsements for her nomination to the Federal bench from many respected members of the legal community in Los Angeles, including her colleagues at Loyola Law School and from the president of the Los Angeles County Bar Association.

Ms. Liebeler also received endorsements from the president of the Association of Business Trial Lawyers, the Federal Bar Association, and the National Association of Women Judges.

Perhaps most significantly, Mr. Chairman, Ms. Liebeler has been endorsed by the Federal Circuit Bar Association, which is the organization of lawyers who practice before the court to which she has been nominated.

As stated in the letter sent to the committee by the association president, Robert D. Wallick, "One of the association's primary responsibilities is to assure that highly qualified persons are appointed to the Court of Appeals for the Federal Circuit."

Mr. Wallick goes on to state that Susan Liebeler possesses "the high ability, integrity, and judicial capacity required for this important court."

Mr. Chairman, this U.S. Court of Appeals for the Federal Circuit is a court unknown to many, including to many lawyers. It has a potpourri jurisdiction of difficult issues spanning a number of technical disciplines.

From Ms. Liebeler's experience first as an attorney, as an academic, and most recently as a public servant at the Securities and Exchange Commission and as Chairman of the International Trade

Commission, she brings a breadth of experience and knowledge that very specially prepares her for distinguished service on the Federal circuit bench.

Mr. Chairman, I urge the committee to proceed both judiciously and expeditiously in its consideration of Susan Liebeler's candidacy, and that the committee bring her nomination to the floor just as soon as possible after we reconvene in September.

Senator **Leahy**. Thank you very much, Senator Wilson.

Senator Gramm.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **Gramm**. Mr. Chairman, I am happy to join the distinguished Senator from California in recommending Commissioner Liebeler. I have known her as a public servant. As an academician, she taught at the University of Texas.

She has had an outstanding career. She is a legal scholar. She has written extensively in the area that she would be working in on the appeals court. She has had an outstanding career here in Washington with the Securities and Exchange Commission and with the International Trade Commission.

I would remind the committee, as people discuss trade policy and its relationship to her position as head of ITC and as it is discussed concerning her qualifications to the Federal bench, that it is the duty of the head of the International Trade Commission to represent the public interest.

The public interest is not always the corporate interest, nor is the public interest always the private interest of any individual State. I would submit that no respectable economist since Adam Smith wrote "The Wealth of Nations" has taken a position that is counter to the position that has been taken by the International Trade Commission.

I think it is fine that we have our own individual opinions about how protectionist we think the American economy ought to be, but I think it is equally important that in looking at someone's qualifications that we judge them on their competency, on their performance, not whether we happen to agree with them on an issue that may or may not even be relevant to the position in this case that Commissioner Liebeler would hold as an appellate judge.

I believe she is qualified. Whether you are looking at her academic record, whether you are looking at her experience as a law professor, whether you are looking at her leadership and competence as a civil servant, as an appointee to very high and important offices, I think she has performed well in everything that she has done.

I am confident that she would be an excellent Federal judge and I commend her to the committee.

Senator **Leahy**. Thank you very much, Senator Gramm. I know both you and Senator Wilson have busy schedules and I appreciate your taking the time to come here.

Senator **Wilson**. Thank you, Mr. Chairman.

Senator **Gramm**. Thank you.

Senator **Leahy**. Ms. Liebeler, would you please stand and raise your right hand?

Do you solemnly swear that the testimony you shall give in this proceeding shall be the truth, the whole truth and nothing but the truth, so help you God?

Ms. **Liebeler**. I do.

Senator **Leahy**. Do you have members of your family here?

TESTIMONY OF SUSAN WITTENBERG LIEBELER, FALLS CHURCH, VA, AND MALIBU, CA, TO BE JUDGE OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Ms. **Liebeler**. I do.

Senator **Leahy**. Would you please introduce them?

Ms. **Liebeler**. Oh, I would be delighted. My daughter, Jennifer Liebeler.

Senator **Leahy**. Jennifer.

Ms. **Liebeler**. My son, Eric Liebeler.

Senator **Leahy**. Eric.

Ms. **Liebeler**. And my husband, Wesley J. Liebeler.

Senator **Leahy**. I met Mr. Liebeler at the airport back here a few weeks ago.

Ms. **Liebeler**. Probably on your way from Vermont.

Senator **Leahy**. Yes. Thank you very much and I am delighted you could all be here. I notice we have also been joined by Senator Grassley. Did you have an opening statement before we go to the questions?

Senator **Grassley**. Mr. Chairman, I do not have an opening statement.

Senator **Leahy**. Thank you.

Ms. Liebeler, Senator Wilson mentioned your Vermont connection, and because that is one of the issues that has been raised and we have submitted questions to you on this, and other Senators have raised it, let me go over this.

Your legal residences are California and Virginia, is that correct?

Ms. **Liebeler**. Yes.

Senator **Leahy**. But you maintain a residence in Vermont?

Ms. **Liebeler**. We have a farm in Vermont, yes.

Senator **Leahy**. How long have you had this property in Vermont and where is it located?

Ms. **Liebeler**. My husband has a farm in Vermont that he bought before we were married. It's in the village of Newfane. I think he has had it since 1962.

Senator **Leahy**. Down in the southeast section of the State, in Windham County?

Ms. **Liebeler**. Yes, near Brattleboro.

Senator **Leahy**. Now, do you also have some rental property in Newfane, VT?

Ms. **Liebeler**. There is an apartment building in the village of Newfane.

Senator **Leahy**. Is that part of this farm?

Ms. **Liebeler**. It's not physically connected to the farm. The farm is outside the village about a mile-and-a-half, and the rental property is on the town common.

Senator **Leahy**. So you have two pieces of property in Vermont?

Ms. **Liebeler**. Yes.

Senator **Leahy**. I just want to make sure we're talking about two different properties.

Ms. **Liebeler**. Yes, we are.

Senator **Leahy**. This rental property, what does it consist of?

Ms. **Liebeler**. It was an old Odd Fellows lodge located between the Newfane Inn and the Four Columns Inn on the town common. The Odd Fellows chapter had been dissolved and the building was run-down and deteriorated. My husband bought the building and restored it.

It is now an eight-unit apartment building. It's a beautiful piece of property.

Senator **Leahy**. And how many rental units does it contain?

Ms. **Liebeler**. Eight.

Senator **Leahy**. Now, do you operate this as an inn, as an apartment house, or how is it operated?

Ms. **Liebeler**. It's an apartment house and my husband operates it in the sense that he leases it. There's a manager as well.

Senator **Leahy**. And how do people normally rent apartments there? Is it by the week, by the month, by the year? What's your normal procedure?

Ms. **Liebeler**. Senator, I haven't been involved in the leasing of the building, but my understanding is that it's typically rented by the year.

Senator **Leahy**. You've had this property how long?

Ms. **Liebeler**. Late 1971 was when it was purchased.

Senator **Leahy**. It's been in both your names since that time?

Ms. **Liebeler**. The property is in my husband's name, Senator Leahy.

Senator **Leahy**. Okay. So your name is not on either of these properties, either the farm or the apartment building?

Ms. **Liebeler**. That's correct.

Senator **Leahy**. In 1973, you had a tenant named Matthew Klein, is that correct?

Ms. **Liebeler**. Yes.

Senator **Leahy**. Now, this committee normally doesn't get itself involved in questions of landlord-tenant disputes, but the one I'm going to talk about resulted in a criminal prosecution of both you and your husband in district court in Brattleboro, VT.

Let's go into this a little bit. Mr. Klein had a lease agreement with you and your husband on this apartment, is that correct, or was the lease just with your husband?

Ms. **Liebeler**. My name was not on the lease.

Senator **Leahy**. So was there a lease agreement?

Ms. **Liebeler**. My understanding, Senator, is that there was.

Senator **Leahy**. But you don't know whether there was or not. Is that what you're saying?

Ms. **Liebeler**. I don't remember, Senator, if I've seen the lease or not, but there was a written lease. Yes, I'm quite sure that there was a written lease.

Senator Leahy. I mean he wasn't just somebody who wandered into the building?

Ms. Liebeler. He was a tenant who had leased an apartment in the building.

Senator Leahy. And do you know when the lease expired?

Ms. Liebeler. Senator, I don't remember. I'm sorry. I believe it was a 1-year lease, however.

Senator Leahy. The incident that I'm talking about took place on July 30, 1973, is that correct?

Ms. Liebeler. Yes.

Senator Leahy. And the lease that Mr. Klein had went substantially beyond that time, did it not?

Ms. Liebeler. I believe that may be the case, Senator.

Senator Leahy. But you don't know?

Ms. Liebeler. I think that you're correct, but it has been so long and I don't have a copy of the lease. But the lease, I believe, went beyond that period of time.

Senator Leahy. Now, do you have any idea what the rent was a month?

Ms. Liebeler. In the mid—$100 to $150 range, something like that. I don't remember precisely.

Senator Leahy. And at the end of July, was Mr. Klein in arrears on his rent?

Ms. Liebeler. Yes, he was.

Senator Leahy. Do you know how much?

Ms. Liebeler. He was a couple of months in arrears at that point; at least a month, and maybe more than that. And he had indicated to my husband that he just wasn't going to pay any more rent.

Senator Leahy. So he was in arrears somewhere from $100-some-odd up to a multiple of twice that?

Ms. Liebeler. Perhaps more, Senator. I'm not precisely sure, but the problem was not only the arrearages. It was the fact that he was no longer paying rent and indicated that he would never again pay rent.

Senator Leahy. And did he say why he was withholding a portion of the rent?

Ms. Liebeler. Senator, my recollection is not fresh, but I do remember that he had a series of complaints with the building which turned out to be illegitimate. My husband had sent some repairmen in and never could find anything wrong with the things that Mr. Klein was complaining about.

Mr. Klein also had some notion that somehow his apartment wasn't correctly wired and he thought his electric bills were too high. This was a problem that arose between him and my husband.

Senator Leahy. And he said that he was withholding it to make these repairs, whether they needed to be made or not. That was his reason for withholding, is that correct?

Ms. Liebeler. Senator, he may have said that, but he also said he was never going to pay another penny in rent and he was just going to stay there rent free.

Senator Leahy. Did he say anything about forfeiting his security deposit to resolve the dispute?

Ms. LIEBELER. Senator, he may have said that, but the dispute was that he would not pay any more rent and he intended to sit there for some period of time rent-free.

Senator LEAHY. Was he simply a tenant or did he do any work around the place for you?

Ms. LIEBELER. He was simply a tenant. There was a manager, who was not Mr. Klein.

Senator LEAHY. The police report says this: "At approximately 1000 on"—I guess that's 10 o'clock; I've always had difficulty reading these reports, but at approximately 1000 on July 30, 1973, both you and your husband went to the Klein apartment by automobile.

"Upon arrival, Mr. Liebeler unlocked the door using his key and both of the accused entered. Once entry was gained, the accused changed the lock on the front door, nailed the windows shut, and removed the victim's personal belongings. They transported the property to their residence."

Is that a factually accurate statement of what happened?

Ms. LIEBELER. Senator, I'm not sure who you mean by the accused. My husband changed the lock, nailed the windows shut, and began to remove the tenant's possessions. There was a provision in the lease that gave my husband, the landlord, the right of entry in the event of arrearages. This provision in the lease had been discussed with the lawyer who was representing the tenant.

Senator LEAHY. Just so that you won't have any misunderstanding of who is referred to in the report, let me go back over it again. I'll take it point by point. I thought maybe we could—I know that Senator Thurmond and others are in a hurry—I was trying to speed up a bit, and I apologize for that.

Did the two of you go to the Klein apartment by automobile at around 10 o'clock on July 30, 1973?

Ms. LIEBELER. I was present, Senator, yes, and the date, to my recollection, is correct.

Senator LEAHY. And when you arrived, did Mr. Liebeler unlock the door?

Ms. LIEBELER. Yes.

Senator LEAHY. Did Mr. Liebeler use his key to unlock the door?

Ms. LIEBELER. Yes.

Senator LEAHY. Did both of you enter the apartment?

Ms. LIEBELER. I don't remember if I entered the apartment right then or not. My husband did.

Senator LEAHY. Did you enter the apartment at some point?

Ms. LIEBELER. I may have, Senator. It's been a long——

Senator LEAHY. But you don't recall?

Ms. LIEBELER. It's been a long time, but you are correct that the possessions were removed.

Senator LEAHY. Did either you or Mr. Liebeler change the lock on the front door?

Ms. LIEBELER. I certainly didn't change the lock. I wouldn't know how. But my husband did.

Senator LEAHY. Did Mr. Liebeler change the lock on the front door?

Ms. LIEBELER. Yes, he did.

Senator LEAHY. Did you or Mr. Liebeler nail the windows shut?

Ms. **Liebeler**. I did not. My husband may have, and I think he did.

Senator **Leahy**. Did either you or Mr. Liebeler remove Mr. Klein's personal belongings?

Ms. **Liebeler**. The tenant's possessions were removed, yes. I don't remember——

Senator **Leahy**. By somebody——

Ms. **Liebeler**. No. My husband removed them and I may have. I have no recollection whether I carried anything or not.

Senator **Leahy**. What did you do with them?

Ms. **Liebeler**. The tenant's possessions were taken to the house in Newfane. A commercial storage company was called and the possessions were turned over to a commercial storage company with a warehouse receipt for the account of the tenant. The receipt was in the tenant's name.

And if my recollection is correct, the moving and storage company took almost everything, but there were certain kinds of things they wouldn't take. For example, they wouldn't take certain kinds of plants and dishes, or some things like that. They took almost everything, but the storage company wouldn't take a few items.

Senator **Leahy**. And what did you do with those items?

Ms. **Liebeler**. Those items remained at the farm. They were set aside and they belonged to the tenant.

Senator **Leahy**. They remained at whose farm?

Ms. **Liebeler**. I'm sorry; the Newfane farmhouse that we discussed earlier which is owned by my husband.

Senator **Leahy**. Okay. Now, at that time you were a member of the Vermont Bar, is that correct?

Ms. **Liebeler**. Yes, I was.

Senator **Leahy**. Now, your husband had told the police that he thought he was within his legal rights to take these actions, and I understand you told the police that you advised your husband of the applicable law.

Is the police report correct that you had advised your husband that he was within his rights to take these actions?

Ms. **Liebeler**. Senator, I wasn't functioning as a lawyer in this transaction at all. My husband did the research on the legality of the lease provision.

Senator **Leahy**. Perhaps——

Ms. **Liebeler**. This was my husband's——

Senator **Leahy**. Let me repeat the question.

Ms. **Liebeler**. Sure.

Senator **Leahy**. Did you advise your husband that he was within his rights to take these actions? I'm not asking you whether you were practicing law or not, Ms. Liebeler.

Ms. **Liebeler**. I'm sorry.

Senator **Leahy**. I'm not suggesting whether you were or not.

Ms. **Liebeler**. Senator, I don't recall having that discussion. We discussed the validity of the lease provision extensively. Jim, my husband, had done the research and it was his belief that it was a valid contractual right of entry, and I also believed it was valid.

Senator **Leahy**. So did you conclude that you had this right of self-help in this situation?

Ms. **LIEBELER**. Did I conclude? It was my husband's call. This wasn't my call. He thought he had it and I agreed with him.

Senator **LEAHY**. Is your husband a lawyer?

Ms. **LIEBELER**. Yes, he is.

Senator **LEAHY**. Now, you say you agreed with him. Do you know what you base that on?

Ms. **LIEBELER**. It was a long time ago, Senator, but he had researched the Vermont law and looked to see if there was any precedent which suggested that that kind of a right of entry by a landlord was unlawful.

This was an ongoing dispute between the tenant and my husband that had gone on for several weeks, and I had tried to help my husband work it out. I went to talk to the lawyer who was representing the tenant, who also happened to be the State's attorney. I talked to him to see if we could work it out, to see if there wasn't some way that we could settle this matter.

Senator **LEAHY**. The police said that you had told them that you had researched the law.

Ms. **LIEBELER**. That is not my recollection, Senator.

Senator **LEAHY**. Do you know what you based your feeling on that your husband had the right to do this?

Ms. **LIEBELER**. The research that my husband had done and the fact that I asked Mr. Diamond, who was the lawyer representing Mr. Klein, the tenant, if he had any authority or precedent that he could cite me to suggest that the contractual provision in the lease was unlawful or invalid. Mr. Diamond was unable to present any precedent or authority.

Senator **LEAHY**. In the questionnaire we sent you this year, you said that the charges that we're talking about now, and I quote, "arose out of a civil dispute with one of the tenants in an apartment building in Newfane, Vermont, owned by my spouse and me. For an extended period of time, the tenant refused to pay rent or vacate the premises. Pursuant to a provision in the lease agreement and under the Vermont innkeeper's lien law, the tenant's possessions were removed and placed in storage. After the tenant's possessions were removed, the local prosecutor who had been advising the tenant filed charges against me. I was never prosecuted and all charges were dropped on December 14, 1973. There was no basis in law or fact for criminal charges. Please see attached letter dated September 16, 1982, from John Rocray."

[Letter follows:]

[illegible]
05301
PHONE 802-257-7182

[illegible]
227 MAIN ST
MATEO BUILDING
SUITE #1

STATE OF VERMONT
OFFICE OF THE STATE'S ATTORNEY
WINDHAM COUNTY
BRATTLEBORO, VERMONT 05301

16 September 1982

To Whom It May Concern

In August 1973 I represented Susan Liebeler in connection with charges for extortion and accessory to extortion filed by the State's Attorney against Mrs. Liebeler. The charges arose out of a dispute Mrs. Liebeler and her husband were having with one of their tenants in their apartment building in Newfane, Vermont. The tenant refused to pay rent or vacate the premises. Acting under a provision in their lease agreement and the Vermont Innkeepers Lien statute, the Liebelers removed the tenant's possessions from the apartment building and placed them in storage.

A young and overzealous State's Attorney then filed charges against Mrs. Liebeler. Mrs. Liebeler plead not guilty and she was released on her own recognizance. She was never prosecuted; the charges were dropped in December, 1973.

This was a civil matter and there was no basis for filing criminal charges against Mrs. Liebeler. A more experienced prosecutor would never have gotten involved. I have served as State's Attorney from 1974 to the present. I would not have filed any charges against Mrs. Liebeler had I been in office at that time.

Please feel free to contact me if you wish to discuss this matter or if I can provide you with any additional information.

Sincerely,

John A. Rocray
State's Attorney

JAR:mc

Senator **Leahy**. The Vermont innkeeper's lien statute applies to premises rented by the day or by the week. Mr. Klein had a long-term lease—in my understanding, a year's lease. Why did you think that the statute applied to this?

Ms. **Liebeler**. My recollection is that the provision in the lease incorporated the rights of innkeepers under the Vermont innkeeper's statute by cross-referencing it, and went on to state that the landlord would have those rights in the event of arrearages over a particular period of time.

Senator **Leahy**. The information or charges in Vermont that were issued in this case charge you with extortion and accessory before the fact of extortion. These charges were subsequently dropped, but let me just read them.

Count 1 alleges that you committed the accessory offense by "counseling Wesley J. Liebeler to enter premises occupied by Matthew Klein and take the property belonging to Klein." Now, did you counsel your husband to enter the premises and take the property?

Ms. **Liebeler**. Senator, my husband doesn't take my advice very often. He had done the research. He was a lawyer. He decided that the lien was valid and I had no reason to suggest to him that it was otherwise.

Senator **Leahy**. Was the purpose of taking the property to hold it until Mr. Klein paid the rent that was in arrears?

Ms. **Liebeler**. No, Senator. The property was put in the tenant's name and the moving and storage company receipt was in Mr. Klien's name. My husband couldn't have gotten the property back from the moving and storage company. It was put in the name of the tenant. There was no attempt to collect the past rent. It was similar to the way a hotel would change the lock on a door of someone who hasn't paid their hotel bill, but there was no attempt to use the property as security for the lien.

Senator **Leahy**. Let me just back up a little bit. Later that same afternoon, your husband and Mr. Klein got into a scrap of some sort, did they not?

Ms. **Liebeler**. Yes.

Senator **Leahy**. And that's nothing you were involved in, is that correct?

Ms. **Liebeler**. That's correct.

Senator **Leahy**. Your husband had been removing the door?

Ms. **Liebeler**. That's correct.

Senator **Leahy**. You helped him load the door into the car after he removed it, but were not involved in the scrap?

Ms. **Liebeler**. I don't recall that at all. I may have helped him load the door.

Senator **Leahy**. Now, let me go back to the——

Senator **Thurmond**. That is the 5-minute bell.

Senator **Leahy**. Yes, we have got the 5-minute bell, but I do not want to leave this group having the wrong idea here.

What was the ultimate outcome of the cases against you?

Ms. **Liebeler**. The ultimate outcome of the case against me is that I was never tried and the charges were not prosecuted; they were dismissed.

Senator **Leahy**. Well, were they dismissed or nol prossed?

Ms. LIEBELER. They were dismissed, I believe. I'm sorry. I'm not able to appreciate the difference.

Senator LEAHY. Were the charges dismissed by a court or dropped by the prosecutor?

Ms. LIEBELER. Senator, I don't recall—I'd have to check the record to know the answer to that. Perhaps your staff has that information.

Senator LEAHY. I might be able to help you on it, but the charges against your husband—what happened on those?

Ms. LIEBELER. The charges against my husband?

Senator LEAHY. Yes, the assault charges.

Ms. LIEBELER. He pled nolo contendere to a misdemeanor assault.

Senator LEAHY. And the charges against you, you said, were dropped or dismissed?

Ms. LIEBELER. They were dismissed. I was never prosecuted and the charges were dismissed.

Senator LEAHY. And why was that? Why were you never prosecuted?

Ms. LIEBELER. My belief is that there was no basis in law or in fact for those charges.

Senator LEAHY. But, yet, to bring the charges, the prosecutor had to show probable cause to a judge, did he not?

Ms. LIEBELER. That's right. That's my understanding, but I do not——

Senator LEAHY. And at some point you had motions to dismiss these charges made on your behalf by an attorney, is that correct?

Ms. LIEBELER. I believe so; Mr. Rocray was representing my husband and me, that's right.

Senator LEAHY. Did somebody move to dismiss the charges or not?

Ms. LIEBELER. Senator, it's been a long time and until this confirmation hearing——

Senator LEAHY. I understand, but we've asked you a number of questions on it and I'm trying to base it on those things that you've said in your answers on the questionnaire.

Ms. LIEBELER. Sure.

Senator LEAHY. So I assume that you had a chance—I mean, we told you we were going to ask you these questions. If you want to take more time to go back and refresh your memory, of course, take more time.

Ms. LIEBELER. No. Senator, I do not remember whether they were dismissed in response to a motion to dismiss or whether the prosecutor dismissed them. I do believe that a motion to dismiss the charges was made by an attorney representing me.

Senator LEAHY. The record that I've seen said that a motion to dismiss was made on your behalf and your husband's behalf and the court denied that. In effect, when the charges are brought, the court has to find probable cause. The prosecutor brings information to the court. They have to find probable cause. The court issued an information; charges were brought.

A motion to dismiss was made. The motion was denied. Your husband subsequently pled guilty to a misdemeanor, or pled nolo, rather, to a misdemeanor, and the prosecutor dropped the charges against you.

Ms. **Liebeler**. Okay.

Senator **Leahy**. That was my understanding and, certainly, if there is any——

Ms. **Liebeler**. Senator, that is consistent with my own recollection.

Senator **Leahy**. And you felt that the prosecutor had been advising the tenant. Are you saying he was representing the tenant in this case?

Ms. **Liebeler**. Yes, I believe that Mr. Diamond did represent the tenant. I went to see him before this incident occurred and talked to him about the dispute between my husband and Mr. Klein.

Senator **Leahy**. And the prosecutor was representing the tenant?

Ms. **Liebeler**. He certainly acted as if he was representing Mr. Klein. He told me that the tenant could stay in the apartment rent-free for several months while we used eviction proceedings. I told Mr. Diamond that if this happened, my husband was going to lose the building. My husband couldn't make the mortgage payments without the rent.

Senator **Leahy**. We have a letter from the former prosecutor who says otherwise. Why don't we take a recess here? We have to go and vote, and I'd be happy to have you discuss that letter with Mr. Metalitz while we vote.

Ms. **Liebeler**. Okay.

Senator **Leahy**. I'm sorry. This was a vote that was supposed to have been at 2 o'clock and I'm sorry that it has interfered with us here.

[Recess.]

Senator **Leahy**. I apologize. I got held on the floor and had to stay.

Senator Thurmond, who is slightly older but far wiser than I, has been sitting here patiently and I will yield to him for any questions, then go back.

Senator **Thurmond**. No; go ahead.

Senator **Leahy**. No?

Senator **Thurmond**. I will wait.

Senator **Leahy**. Are you sure?

Senator **Thurmond**. Yes. You go ahead.

Senator **Leahy**. Any time you want to butt in, just say so.

Senator **Thurmond**. No; go ahead.

Senator **Leahy**. Ms. Liebeler, I understand that you've seen the letter I was referring to.

Ms. **Liebeler**. Yes, thank you. I have a copy of it, Senator. May I please address the letter?

Senator **Leahy**. Certainly.

[Letter follows:]

DIAMOND & ASSOCIATES, P.C.
ATTORNEYS AT LAW
DRAWER D
MONTPELIER, VERMONT 05602

(802) 223-6166

M. JEROME DIAMOND
STEPHEN C. SMITH

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LEGAL ASSISTANT

73 MAIN STREET
SUITE 400
MONTPELIER, VERMONT

126 COLLEGE STREET
BURLINGTON, VERMONT
(802) 862-8195

REPLY TO: P. O. DRAWER D
MONTPELIER, VERMONT 05602

June 29, 1987

Honorable Patrick J. Leahy
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Re: Nomination of Susan K. Liebeler

Dear Pat:

In response to your letter of June 24th, I have reviewed Mrs. Liebeler's statement and the letter from John Rocray and have the following recollections.

First of all, Mr. and Mrs. Liebeler were both active participants in the events which led up to their arrest. Instead of going through Vermont's statutory eviction requirements that were in place at the time, the Liebeler's decided that they could self-help themselves to their tenant's property and hold the property until paid in full. Wesley Liebeler broke into the tenant's premises, removed all the property and stored same with a storage company, I believe, then demanded payment. Within the context of the removal of the property, the tenant and Mr. Liebeler got into an argument and Mr. Liebeler assaulted the tenant.

Efforts were made to resolve the matter by resort to civil jurisdiction, but the tenant had no means of getting back his property within a reasonably quick timeframe. Furthermore, both Mr. and Mrs. Liebeler were really very nasty in their dealings with everyone. Mrs. Liebeler was present during everything and furthermore assisted and advised her husband with regard to everything except the assault.

Finally, I issued informations charging Wesley Liebeler with assault with intent to commit a felony, the felony being extortion. He was also charged with extortion. Susan Liebeler was charged with two charges relating to the extortion. With regard to her assertion that that there was no basis in law or fact for the charges, she has obviously forgotten two important items: first, a judge initially ruled that there was probable cause for the charges; and second, her attorney filed a Motion to Dismiss the charges based upon the allegation that there was no basis in law or facts for the charges. There was an extensive hearing and memorandums of law filed. The Liebelers lost, and then their attorney began negotiating for a plea. Ultimately the plea negotiations resulted in Wesley Liebeler entering a plea to one of his charges, and the charges against

Susan being dropped.

As I recall, I handled the case. I had been a State's Attorney at that point for over three years. While Mrs. Liebeler, I believe, was admitted to practice law in Vermont, she did not actually practice here. They were both professors of law at UCLA at the time, I believe. Regretfully they were both as nasty as could be, and I cannot conceive her temperament being considered judicial under any circumstances unless she has mellowed considerably in the last few years.

Mr. Rocray's characterization that there was justification for the Liebelers' actions under the Vermont Innkeeper's Lien Law got nowhere with the court in 1983. The Liebelers' did not run an inn. The fact that John Rocray would not have issued the charges had he been States' Attorney, says nothing as to whether they were legitimate charges. The Court obviously thought they were. Furthermore, one must consider the source and evaluate Mr. Rocray's credibility as a prosecutor, and in that context realize that he is only the second lawyer States' Attorney in modern Vermont history to be defeated for re-election by a non-lawyer!

I hope this recollection will be of some service to you as you evaluate and make your decisions. More recent observations will probably be of more value. You should, however, check California law enforcement authorities. As I recall there was something concerning a possible disturbing the peace allegation or charge against Wesley Liebeler. I cannot recall the circumstances of that incident.

Sincerely,

M. Jerome Diamond, Esq.

MJD/dp/mjd2/leahy.liebl

Ms. **Liebeler**. I've just read the letter and I'm really quite surprised to see that nowhere in the letter does Mr. Diamond disclose that he was representing the tenant, because my understanding was that he was representing the tenant at the time. I was told he was representing the tenant.

I went to see him and——

Senator **Thurmond**. Could you speak a little bit louder so we can hear you?

Ms. **Liebeler**. Oh, certainly, Senator.

I went to see Mr. Diamond to try and work things out when I thought he was representing the tenant and, in fact, I made a settlement offer to Mr. Diamond which he rejected.

Senator **Leahy**. A settlement offer in whose behalf?

Ms. **Liebeler**. Excuse me?

Senator **Leahy**. What do you mean by a settlement offer?

Ms. **Liebeler**. My husband wanted the tenant to leave the property and on behalf of my husband I offered to forgive the back rent and pay some moving expenses if Mr. Klein would vacate the premises. Mr. Diamond was unwilling to discuss settlement and rejected the offer. And I'm just kind of surprised in this letter——

Senator **Leahy**. Then how did it finally resolve itself? What finally happened?

Ms. **Liebeler**. What——

Senator **Leahy**. What finally happened? I mean, did the tenant leave?

Ms. **Liebeler**. The tenant did not move back into the apartment building. He took his possessions from the moving company and left and——

Senator **Leahy**. And did not take any money from your husband. That's what I don't understand. Explain again what the settlement offer was.

Ms. **Liebeler**. I explained to Mr. Diamond that my husband was going to lose the building and that we couldn't continue making the mortgage payments for 5 or 6 more months while the tenant wasn't paying rent. Mr. Diamond said that the guy was entitled to stay there rent-free, and so I offered to pay the tenant's moving expenses, several hundred—a few hundred dollars, maybe. I don't remember the exact amount I offered to pay, it was a few hundred dollars, no more than $400 or $500, plus forgiveness of the back rent.

We just wanted the tenant out of the building because there was a constant problem. There was disharmony because of this tenant. Mr. Klein had a series of imaginary complaints with the building, and he was a very difficult tenant to deal with.

And I notice in Mr. Diamond's letter that he doesn't disclose that he was representing the tenant.

Senator **Leahy**. But the question I had, and to make sure I fully understand, you offered what would be in effect a fairly substantial amount of money to the tenant, but he never took that money and he left anyway.

Ms. **Liebeler**. He did leave, yes, but his possessions had been taken out of the apartment building. He had not left before his possessions were removed. We'd asked him to leave several times.

Senator Leahy. I understand. When did you offer him the money and the moving expenses, before or after you took his things out of the apartment?

Ms. Liebeler. I made the offer to Mr. Diamond before the tenant's things were taken out of the apartment.

Senator Leahy. So after you took the things out, he took off, didn't take any moving expenses from you and——

Ms. Liebeler. My recollection is that we did not pay him anything.

Senator Leahy. Thank you.

Ms. Liebeler. Senator, because I have just seen this letter for the first time, there are some statements in the letter that I find somewhat disturbing and would just like to mention.

Mr. Diamond comments that I was an active participant in all these events, and I would just like to state that I was not. This was essentially my husband's problem and my husband's dispute with the tenant, although I did talk to Mr. Diamond about it.

He also makes some statement about my being very nasty at all times. My recollection is that I spoke to Mr. Diamond on one occasion, and that was when I was in his office.

Senator Leahy. I think he's referring to not just his dealings with you. I think he used the expression "with everyone". I don't think he was talking about just dealings with you.

Ms. Liebeler. Well, I have no idea what he's referring to.

Senator Leahy. Do you want to say anything more? I don't mean to——

Ms. Liebeler. No.

Senator Leahy. Were you in Vermont on official business in August 1985?

Ms. Liebeler. Excuse me? I was on what kind of business? I didn't hear you.

Senator Leahy. Official business, official ITC business, in August 1985.

Ms. Liebeler. Oh, in 1985. Yes, I was.

Senator Leahy. Do you recall the nature of that business?

Ms. Liebeler. Yes, I do, Senator. Commissioners of the International Trade Commission frequently make plant and industry visits to learn about conditions of trade. I was aware that a section 201, an escape clause, case concerning apples and apple juice, was about to be filed at the ITC. Shortly before the case was filed I went to Putney, VT. I spent a day, no, it was half a day, at Green Mountain Orchards inspecting the facilities, talking to the owner, and observing his production facilities and his juice-making.

Senator Leahy. Now, one of your first official acts when you became Chairman of the International Trade Commission in June of 1986 was to enter into a contract with MDS, Inc., for a management study of the Commission's operations. There have been a number of questions raised about the contract; I'm sure you're aware of it. I'd like to explore it a bit.

At our request, you provided a great deal of information from ITC files about this contract. You've prepared a narrative overview and we'll make the overview a part of the record.

[Aforementioned overview follows:]

0024S

701 E Street, NW
Washington, D.C. 20436
July 10, 1987

Mr. Robert Short
United States Senate
Committee on the Judiciary
139 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Short:

You have asked me to provide an overview of events related to the Commission's purchase orders with MDS, a management consulting firm. I enclose for your use a ten page narrative. For your convenience I have made cross references to the documents in the two MDS looseleaf notebooks (Notebook 3, MDS Nonconfidential Notebook, and Notebook 4, MDS Confidential Notebook) previously furnished to you.

Please call me if you have any questions or if you need any additional information.

Sincerely,

Susan Liebeler

Susan Liebeler

Enclosures

0804p

OVERVIEW OF EVENTS RELATED TO MDS
BY SUSAN LIEBELER

As I prepared to take over the Chairmanship of the International Trade Commission on June 17, 1986, I knew that, as of September 30, 1986, I would be required to certify the extent of the Commission's compliance with the Federal Managers' Financial Integrity Act ("Integrity Act"). I felt the need to obtain reliable information quickly on Commission management and financial operations, given that my certification would cover an 8-1/2 month period during which I was not Chairman, and that there was no internal audit program then in place to test the adequacy of the Commission's management and control procedures. I decided to obtain the services of an independent management consultant to assist me in evaluating the Commission's management and internal controls and to provide advice on my responsibilities under the Integrity Act. It was my intention to obtain the report and recommendations of a consultant and circulate them to the Commissioners for discussion.

In May of 1986 I had preliminary discussions in this regard with a management consulting firm, MDS, and two of its principals, Marshall Sokol and Alan Seissler. I initially met Mr. Seissler in December 1982 when I entered into a contract to purchase a home in Bethesda, Maryland. Mr. Seissler was introduced to me by Polly Berteling, a Merrill Lynch real estate broker. Mr. Seissler brokered a mortgage loan application for me. Because of a delay in my confirmation process, I did not buy the house or use the mortgage financing. In the summer of 1984, following my confirmation as an ITC Commissioner, I telephoned Mr. Seissler and used him as a loan broker on my present mortgage financing. In my dealings with Mr. Seissler on these two occasions he seemed quite competent. He appeared well versed in accounting and finance and exhibited a sophisticated understanding of computers and office automation, an area in which I have been particularly interested. In the course of our discussions he represented that he was a certified public accountant, and that he held an MBA from Harvard and a Ph.D. in computer science. He told me that he had worked for several years at the Federal National Mortgage Association (FNMA) where he had been responsible for administering and supervising FNMA's loan portfolio, and that he had designed the software for monitoring these loans.

I did not talk to Mr. Seissler again for many months. I believe he telephoned me some time in the spring or summer of 1985 to ask how I was enjoying my responsibilities as a Commissioner and Vice Chairman. We had lunch and talked extensively about office automation at the ITC.

Later in 1985 Commissioner Lodwick and I had several conversations about office automation and the need to provide personal computers and support for the Commission's professional staff. I remembered my previous discussion with Mr. Seissler and invited him to meet with Commissioner Lodwick and me. That meeting took place in early February of 1986, when Commissioner Lodwick and I had lunch with Mr. Seissler. At this luncheon meeting I introduced Mr. Seissler to Commissioner Lodwick as a certified public accountant, with a Harvard MBA and a doctorate in computer science. Mr. Seissler did not contradict me.

At lunch, we discussed computers and automation at the ITC. Mr. Seissler told us he was a principal in, and an employee of, American Management Services ("AMS") and he gave us his business card. Mr. Seissler told us that Chairwoman Stern was in the process of contracting with AMS through GSA for a management study on the short-term and long-term office automation and information needs of the Commission and my impression was that Mr. Seissler indicated that he might be working on the AMS contract for the ITC. Commissioner Lodwick and I had not been aware of that contract. We then asked Mr. Seissler for prior studies that he and AMS had performed and for references. My recollection is that Mr. Seissler referred us to two major projects, one for the Commodity Futures Trading Commission (CFTC), and another for the Department of Agriculture and indicated that he would have copies of these studies sent to us.

After our luncheon with Mr. Seissler, Commissioner Lodwick and I compared notes. I was favorably impressed with Mr. Seissler, as I believe was Commissioner Lodwick. A few days later I received a copy of a study setting forth a five-year automated data processing (ADP) plan for the CFTC which was done by AMS. My recollection is that I checked with Chairman Susan Phillips of the CFTC and was advised that the study and work were very good. Commissioner Lodwick told me that he checked out the other study with people at the Department of Agriculture and got very good reports. I did not keep my notes on this matter although I still may have a copy of the CFTC study done by AMS.

In May of 1986, as I began to prepare for the Chairmanship, I called Mr. Seissler and asked him to come to my office to discuss my responsibilities under the Integrity Act. When I spoke to Mr. Seissler, he advised me that he was no longer with AMS and that he had joined a new firm, MDS, and he would bring his business associate, Marshall D. Sokol, along to the meeting.

I met with Alan Seissler and Marshall Sokol twice in May 1986, on May 22 and May 27. Vice Chairman Brunsdale was present at both meetings. During the first meeting, Mr. Seissler represented that both he and Mr. Sokol held Ph.D. degrees, Mr. Seissler's in computer science and Mr. Sokol's in economics. (I do not remember if Mr. Sokol was in the room when these representations were made, but Mr. Sokol later told us that his graduate work was in finance and not economics.) Mr. Seissler also told both Vice Chairman Brunsdale and me that he was a certified public accountant, and that he had an MBA from Harvard. The Vice Chairman and I had no reason to disbelieve these representations. Mr. Seissler and Mr. Sokol discussed their knowledge and experience with the Integrity Act, OMB Management Circulars, and cash management control techniques. They also provided us with a list of several seminars that MDS had presented, or was to present, and several publications and pamphlets (Notebook 3, Tab I, Item b.) including: ✓

1. Strategic Initiatives for Entrepreneurial Management: Resource Management As A Business. Department of the Army: Resource Management Continuing Education, November, 1986.

2. Macrolink: The Management Function, Application and Information Systems Integrator. The MDS Companies, Inc.

3. How Competition is Sharpening Cash Management: Cost-Conscious CFOs and Technological Advances Are Combining to Make Banks Take A Fresh Look At Cash Management. Institutional Investigator, June, 1982.

4. Consultant Believes City, State, US Governments are Potentially Lucrative Markets for Operational Services. American Banker, April 25, 1986.

5. Cash Management Much Needed and Underused Idea. Marshall Sokol, May, 1986.

6. The Systems Approach to Cash Management. Marshall Sokol Associates, Inc., 1981.

7. EFT Comes to the Corporate Suite: Skyrocketing Check Costs Are Finally Forcing Cash Managers to Probe the Frontiers of Electronic Funds Transfer. Institutional Investor, June, 1983.

8. 8th Annual Government Cash Managers Conference: Integrating Financial Objectives, Operations and Systems. MDS Cash Communications, Inc., April, 1986.

9. Corporate Accounting Vol. 2, No. 4, Fall 1984. Warren, Gorham and Lamont, Inc.

10. Corporate Accounting Vol. 3, No. 1, Winter 1985. Warren, Gorham and Lamont, Inc.

At these meetings Mr. Sokol and Mr. Seissler discussed the requirements of the Integrity Act. They also discussed and compared the costs and advantages of using outside audit services versus an in-house controller or inspector general.

I met with Mr. Seissler and Mr. Sokol once or twice again before I became Chairman. We discussed the various types of management structures and internal controls used by firms and other federal agencies and in this context I mentioned to them that I was looking for a seasoned administrator for a position on my staff. Mr. Sokol referred two prospective candidates to me. We discussed the backgrounds of these two individuals extensively. (Although I interviewed both of them, checked their references and gave them serious consideration, I hired someone else for the position.)

MDS in general, and Mr. Seissler and Mr. Sokol in particular, appeared well-qualified to perform the consulting services the Commission needed. They appeared to have expertise in accounting and management, as well as strong backgrounds in mainframe and personal computers. They appeared to be familiar with independent agency responsibilities under the Integrity Act and OMB Management Circulars A-123 and A-127. I asked Messrs. Seissler and Sokol what MDS would charge to do a management study of my responsibilities under the Integrity Act. They offered to do such a study for a sum not to exceed $25,000.

In light of Commissioner Lodwick's favorable comments on Alan Seissler and the AMS studies and after consultation with Vice Chairman Brunsdale, I advised the ITC's Director of Administration, Lorin Goodrich, that I wanted the

Commission to retain MDS to do a management study in connection with my new responsibilities as Chairman. (Notebook 3, Tab II, Item a.)

Mr. Goodrich advised me that the Commission could contract for up to $25,000 without going through competitive bidding and that he, or his staff, would prepare the necessary paperwork. On June 17, 1987 MDS was hired to provide advice on management responsibilities relevant to my responsibilities under the Integrity Act. (Notebook 3, Tab II, Item b.) The purchase order provided for six deliverables, including oral briefings and a draft and final written report, and two payments, one of $8,662.50 on June 24, 1987 and a second of $16,087.50 on acceptance of the final report. The contracting officer was the Director of the Office of Management Services, David Spencer, and I was the contracting officer's technical representative.

On June 18, 1986 I provided Mr. Seissler and Mr. Sokol with a desk and file cabinet in my office. During the five weeks following the signing of the purchase order both men spent time at the ITC interviewing three Commissioners and various members of the senior staff and reviewing documents. I had several meetings with them. After delivery of the June 24, 1987 written progress report and oral briefing, the first installment of $8,662.50 was approved for payment. (Notebook 3, Tab VI, Item a.)

After I received the July 21, 1986 draft report (Notebook 3, Tab III, Item e.) I reviewed it carefully with members of my staff and with the Vice Chairman. Later that week the Vice Chairman and two members of my staff, Richard Dagen and Robert Rogowsky, and I had a meeting with Mr. Sokol and Mr. Seissler to discuss the draft report. Our concern was that while the conclusions of the report seemed sound, the report failed to describe adequately the evidence supporting these conclusions. In response to our questions and comments, Mr. Sokol and Mr. Seissler provided additional information about the basis for their conclusions and agreed to rewrite the final report.

In mid-July, I became concerned about the Commission's budget process and had several conversations with Mr. Seissler about my need for assistance in this area and asked what MDS would charge to provide services and advice to me during the budget cycle. Mr. Seissler indicated that MDS could provide such advice and assistance for a sum not to exceed $18,000. I discussed with the ITC's

Director of Administration, Lorin Goodrich, the possibility of the Commission hiring MDS to provide analysis and advice to the Chairman on budget matters. At my request, Mr. Goodrich prepared the paperwork for the purchase order. (Notebook 3, Tab II, Item e.) On July 29, 1986, the Commission entered into a second purchase order with MDS to provide assistance in preparing the FY 1988 budget for a sum not to exceed $17,950. (Notebook 3, Tab III, Item f.) The contracting officer was Lorin Goodrich, the Director of Administration, and the contracting officer's technical representative was Robert Rogowsky, a member of my staff. (As explained below, no services were rendered under this purchase order and it was cancelled at my request.)

Meanwhile, the final report under the first purchase order was delivered on July 30, 1986. (Notebook 3, Tab II, Item f.) I still did not believe that the written report provided adequate substantiation for many of its conclusions. In addition, the final report was not well written. I did not feel, however, that these concerns justified not accepting the final report and it was accepted.

As I had planned, I circulated the final report to the other members of the Commission to solicit their views. I also hand delivered copies of the report to staff members of the House Ways and Means and Senate Finance Committees. The Commissioners apparently reviewed the report and let me know immediately that they had questions and wished to meet with Messrs. Seissler and Sokol to discuss them.

During the period beginning August 4, 1986 my staff worked with the other Commissioners' offices and Mr. Sokol and Mr. Seissler to try to schedule meetings to discuss the final report. To my displeasure, Mr. Sokol and Mr. Seissler were not as cooperative as they should have been in scheduling these meetings. I met with Mr. Seissler at least two times during the week of August 11, 1986 and Vice Chairman Brunsdale was present at one or both of these meetings. We expressed our displeasure at Mr. Seissler's and Mr. Sokol's unavailability and failure to meet with the other Commissioners to answer questions about the final report and we insisted that Mr. Seissler schedule a meeting with the Commissioners to discuss the final report.

Such a meeting took place on Friday August 15, 1986, when Mr. Seissler met with Vice Chairman Brunsdale and Commissioners Rohr, Eckes and Lodwick in my office to discuss that part of the final report dealing with financial matters, audits, data processing and procurement. (Commissioner Stern was out of town and unable to attend the meeting.) At this meeting I referred to Alan Seissler as Dr. Seissler and he did not correct me. At this meeting there was also extensive discussion between Mr. Seissler and the Commissioners about various aspects of the report. At the conclusion of this meeting, it was suggested that the Commissioners schedule individual follow-up meetings with MDS and that my office would be happy to provide scheduling assistance.

On Tuesday August 19, 1986, I learned that Mr. Seissler was not cooperating with Commissioner Stern in setting up a meeting and that Mr. Seissler and Mr. Sokol had not provided the Commissioners with a curriculum vitae or other biographical materials Mr. Seissler had promised to give them. On Wednesday, August 20, 1986, certain events occurred which, as described below, led me to question the credibility of Mr. Seissler, and question whether MDS had performed all the tasks they indicated to me they had performed in their deliverables under the purchase order.

I spoke with Mr. Seissler on the telephone early in the morning of August 20 and asked why he had failed to meet with the Commissioners and furnish the promised curriculum vitae. He said that he was sorry about the biographical material, but that his computer system's "hard disk had crashed" and he had to create his biographical material anew. He said he was out of the office, and would call my secretary and dictate it to her. Later that day he telephoned Hilda Wickham, a secretary who was on loan to my office from another office, and dictated a curriculum vitae to her. (Notebook 3, Tab I, Item a.) ✓

After Ms. Wickham showed me the vitae she had typed, I spoke with Mr. Seissler on the telephone to discuss it with him and to try to get him and Mr. Sokol to schedule meetings with the other Commissioners. I also asked Mr. Seissler why there were no dates disclosed for his graduate degrees. Mr. Seissler gave me some dates but the tone of his voice made me suspicious that he did not have the degrees he claimed. I asked if he really had those degrees. First he assured me that he did; then after more questioning, Mr. Seissler told me that neither he nor Mr. Sokol had Ph.D. degrees. I expressed displeasure with his previous misrepresentations and told him that I would consult with counsel about this matter.

Approximately twenty minutes later I was in a meeting in Vice Chairman Brunsdale's office when Mr. Seissler walked into the meeting and asked to speak to me privately. We went to my office where he apologized to me for not telling the truth about his credentials. I told him that I was cancelling the second purchase order. I told him that I expected MDS to meet with the other Commissioners to answer their questions about the MDS report. I asked him why he had refused to meet with Commissioner Stern. He told me that he did not want to meet with her because he was afraid that he would physically harm her.

I asked Mr. Seissler to leave the building and to return his building pass and the key to the file cabinet he had been using. He handed me the building pass, unlocked the file cabinet, and handed me the key. I saw a large bound volume in the file drawer and asked Mr. Seissler what it was. Mr. Seissler admitted to me in the presence of one of my staff, Richard Dagen, that it contained certain documents that Richard Arnold, the budget director had unsuccessfully been seeking from Mr. Seissler for some time. (Mr. Arnold, the budget director, had asked Mr. Seissler to return to him certain accounting records of the Commission which Mr. Arnold had furnished him. On at least four previous occasions I had asked Mr. Seissler about the missing documents and asked him to please look for the missing documents in his office. Each time Mr. Seissler had stated that he had never seen the documents and had suggested that the documents probably did not exist.) I asked Mr. Seissler why he had hidden the documents and he told me that he wanted to "make trouble for Rick Arnold but now it didn't matter any more...." I left the room and Mr. Seissler left the building.

Because Mr. Seissler's responses and actions were so questionable, I had doubts as to whether MDS had performed the tasks they represented to have done in their final report. (For example, in the final report MDS stated they reviewed all published vulnerability assessments and management control reviews, and reviewed all 1985 purchase orders utilizing GAO sampling techniques and 1986 purchase orders over $15,000 through April 30, 1986.)

By telephone on August 20 or August 21, I instructed the Director of Administration to cancel the second MDS purchase order and to suspend the second payment on the first purchase order. These instructions were subsequently confirmed in my August 22, 1986 memorandum to the Director of Administration. (Notebook 3, Tab II, Item h.) ✓

I was also aware that MDS had several other Government contracts, one with the Department of the Army and one with the Department of Energy. Because of these purchase orders, I was concerned that failure to report this matter to appropriate authorities could aid and abet possible misrepresentations or fraudulent activity in connection with these contracts. After carefully considering this situation and consulting with my own counsel, on Wednesday morning August 21, 1986 I telephoned the office of the Assistant Attorney General of the Criminal Division of the U.S. Department of Justice (DOJ), and asked for an appointment to discuss a matter involving possible fraud against the Government. My call was transferred to Victoria Toensing, Deputy Assistant Attorney General in charge of the fraud section. I told her briefly about my problem with MDS. She said that she was unable to meet with me that day but she would have her deputy, Don Foster, get back to me to arrange a meeting. A few minutes later I spoke with Don Foster, Deputy Chief, Fraud Division, DOJ. We met later that morning at his office. The following people attended the meeting:

Susan Liebeler, Chairman ITC
Richard Dagen, Chairman Liebeler's staff
Robert Rogowsky, Chairman Liebeler's staff
Lyn Schlitt, ITC General Counsel
Don Foster, DOJ
Kathleen Snyder, Special Agent, FBI
James Denton III, Chief, Government Fraud Unit, White Collar Crime Section, FBI
William T. Redden, Jr., Special Agent, FBI
Jerry Simpson, Supervisory Special Agent, FBI

The meeting lasted approximately one hour during which time I discussed the background of the MDS purchase order and gave the FBI agents copies of the MDS purchase orders. (Notebook 4, Items 2, 3 and 4.) In the afternoon of August 21, I met with Commissioners Stern, Lodwick, Rohr and Vice Chairman Brunsdale along with two members of my staff, Richard Dagen and Robert Rogowsky, and the ITC General Counsel, Lyn Schlitt. At this meeting I described my previous day's dealings with Mr. Seissler and my morning meeting with the DOJ and FBI. Commissioner Eckes was out of town and I discussed the matter with him later in the day on the telephone.

Several Commissioners had questions about the MDS matter. In response to their concerns I held a closed Commission meeting on MDS on October 2, 1986. (Notebook 4, Item 1.) In addition, Commissioner Rohr sent me written questions in an August 15, 1986 memo to which I responded in writing on October 14, 1986. (Notebook 3, Tab V, Item h.) ✓

Following the meeting on August 21, I asked the Commission's General Counsel to provide advice on withholding payment of the second installment on the MDS purchase order. (Notebook 4, Item 5.) The Commission ✓ suspended payment of the second installment of the MDS purchase order while the FBI was investigating this matter. (Notebook 4, Items 6, 7, 8.) ✓

At my request in December of 1986 the Commission's General Counsel again spoke to the DOJ Civil Division concerning possible civil action against MDS. The General Counsel advised me that she would inquire as to the status of the criminal investigation, see if there were other potential plaintiffs for the civil action, and prepare the file of pertinent documents for transmittal to the appropriate agency. (Notebook 4, Item 12.) ✓

Sometime in late December of 1986 or early January of 1987 the Department of Justice decided not to prosecute MDS or its principals and closed its investigation. I asked the General Counsel to consult with the Civil Division of the Department of Justice and provide Mr. Spencer, the contracting officer, with her advice on payment of the second installment under the purchase order. Based on the advice of the General Counsel, Mr. Spencer, the contracting officer, paid MDS the second installment of the purchase order. (Notebook 4, Item 15.) ✓

In summary I believe that the facts set forth above clearly show that:

1. I requested that the Commission hire MDS in good faith, believing that MDS, and Marshall Sokol and Alan Seissler, were well qualified to perform the mangagement study I needed.

2. I immediately acted to terminate MDS and referred the matter to appropriate law enforcement authorities for investigation when I learned that its principals did not have the credentials that were represented to me and that Mr. Seissler's performance was not consistent with professional standards.

3. My fellow Commissioners were aware of the study while it was being done, and at least three of them met with Mr. Seissler or Mr. Sokol during the performance period of the purchase order. The final report was circulated to them as soon as it was available.

4. All the Commissioners were given an opportunity to explore the conclusions of the report and the lack of cooperation shown by Mr. Seissler and Mr. Sokol in meeting with the Commissioners was one of the reasons for my dissatisfaction with MDS.

Senator **Leahy**. Let me refer to some of these documents. The man who was primarily responsible for the performance of this contract was an Alan Seissler. You said you first met him in December of 1982. He was introduced to you by Polly Berteling, a Merrill Lynch real estate broker.

Was Mr. Seissler working in Ms. Berteling's real estate office at that time?

Ms. **Liebeler**. I don't believe so.

Senator **Leahy**. You don't think Mr. Seissler was working in Ms. Berteling's real estate office?

Ms. **Liebeler**. That real estate firm was Merrill Lynch Realtors and it was never——

Senator **Leahy**. I beg your pardon?

Ms. **Liebeler**. Ms. Berteling was employed by Merrill Lynch Real Estate, and to my knowledge, Mr. Seissler was not employed there. No representation was ever made to me that Mr. Seissler was employed by Merrill Lynch.

Senator **Leahy**. Was he working in her real estate office at that time?

Ms. **Liebeler**. No, not to my knowledge.

Senator **Leahy**. At the time you met him, he agreed to arrange mortgage financing for you, but you decided not to purchase a home at that time?

Ms. **Liebeler**. That's correct.

Senator **Leahy**. How did it come about that he offered to arrange mortgage financing? Was he a banker?

Ms. **Liebeler**. When I was looking at houses in the Maryland area, I had entered into an escrow agreement on a house, the closing was contingent on my confirmation to the ITC. I had asked the real estate broker what she thought were prevailing loan rates in the area.

Ms. Berteling, the real estate broker, gave me a loan sheet and she said "there is someone I frequently use as a loan broker for my clients; let me have him call you." And a gentleman named Alan Seissler called me, introduced himself, and said that he was referred by Ms. Berteling.

Senator **Leahy**. Now, your next contact with him was in the summer of 1984 when you did purchase a house and at that time he did arrange the mortgage financing, is that correct?

Ms. **Liebeler**. That is correct. He was a loan broker.

Senator **Leahy**. Did you employ Ms. Berteling's real estate office in that transaction or did you arrange it directly with Mr. Seissler?

Ms. **Liebeler**. I worked with the same Merrill Lynch broker, Polly Berteling. When we decided not to purchase a home in Maryland Ms. Berteling worked with a broker in the Virginia office of Merrill Lynch.

At that point I asked Polly Berteling if that fellow—and I don't think I remembered his name—still was available for that kind of loan brokering. She said yes and she gave me his number and I called him. Well, she may have called him and he called me; I don't remember which.

Senator **Leahy**. Did he obtain a mortgage for you at that time?

Ms. **Liebeler**. Yes, he did.

Senator **Leahy**. And that was at market rate?

Ms. LIEBELER. Yes.

Senator LEAHY. And how was he compensated for that? How do you pay him to do that sort of thing?

Ms. LIEBELER. Senator, I'm not sure I remember. I may have given him a check directly or it may have been included in the closing fees at settlement.

Senator LEAHY. Whatever it was, it appeared to you to be a normal transaction?

Ms. LIEBELER. Yes. It was a few hundred dollars, yes.

Senator LEAHY. Okay. Who held the mortgage?

Ms. LIEBELER. The name of the mortgage company has changed because there was a merger. Westmark Mortgage now holds the mortgage, but before the merger the mortgage was held by its predecessor in interest Westchester Mortgage or Westchester Savings.

Senator LEAHY. Did the mortgage-holder have any relationship or any prior relationship with Mr. Seissler that you know about?

Ms. LIEBELER. I believe that Mr. Seissler may have been employed by Westchester Savings, although I'm not sure. I believe he was so employed at one period in time. I think he told me that he was employed there.

Senator LEAHY. Now, have you ever had any other personal business relationship with Mr. Seissler or any members of his family?

Ms. LIEBELER. No, Senator, except for the MDS contract, which was a business——

Senator LEAHY. No; I mean personal business relationship, not ITC business——

Ms. LIEBELER. No.

Senator LEAHY. Your narrative indicates that in the course of your discussions, speaking of yours and Mr. Seissler's, Mr. Seissler represented to you that he was a certified public accountant with an MBA from Harvard and a Ph.D. in computer science.

Did he make these representations to you back in 1984 or some time later?

Ms. LIEBELER. He made them to me in 1982, I believe, and again in 1984 and again after that.

Senator LEAHY. And was it a representation that he was a CPA?

Ms. LIEBELER. Yes.

Senator LEAHY. And that he had an MBA from Harvard?

Ms. LIEBELER. Yes.

Senator LEAHY. And a Ph.D. in computer science?

Ms. LIEBELER. Yes.

Senator LEAHY. Where was the Ph.D. from?

Ms. LIEBELER. I don't remember if he told me where his Ph.D. was from.

Senator LEAHY. You didn't ask him?

Ms. LIEBELER. I don't remember if I asked him.

Senator LEAHY. Now, according to your narrative, your next contact with Mr. Seissler was initiated by him, and correct me if I'm wrong—I want to make sure I characterize the narrative properly—that he called you in the spring or the summer of 1985 to ask you how you were enjoying your responsibilities at the ITC. Is that correct?

Ms. LIEBELER. Yes.

Senator LEAHY. And you had lunch and you discussed office automation at the ITC, is that correct?

Ms. LIEBELER. With another commissioner and Mr. Seissler.

Senator LEAHY. Who was the other commissioner?

Ms. LIEBELER. Seely Lodwick.

Senator LEAHY. And did Mr. Seissler tell you where he was working at that time?

Ms. LIEBELER. Yes, he did. He told us that he was a principal in AMS, American Management Systems, a Washington consulting group that does a lot of consulting with government agencies. They are a fairly well known consulting group.

Senator LEAHY. Now, in February did you invite him to have lunch with you again?

Ms. LIEBELER. I may have had lunch with him again perhaps once. I don't remember. I honestly can't remember, Senator. I may have seen him one more time. I can't remember.

Senator LEAHY. My recollection of your narrative, and I don't have it right here before me, was that there had been two lunches, the lunch we first discussed, the one in spring or summer of 1985, and in February of 1986 you had another lunch with Mr. Seissler and Commissioner Lodwick was at that one.

Ms. LIEBELER. Oh, yes. I thought you meant another lunch after that. I remember those two lunches.

Senator LEAHY. And it was at that luncheon that Mr. Seissler told you he was a principal in AMS?

Ms. LIEBELER. Yes, at the Lodwick lunch.

Senator LEAHY. So that there was a first lunch without Mr. Lodwick and then a second lunch with Mr. Lodwick, is that correct?

Ms. LIEBELER. That's correct.

Senator LEAHY. And it was at the Lodwick lunch that he said he was a principal in AMS?

Ms. LIEBELER. That's right.

Senator LEAHY. In your narrative you say, "We then asked Mr. Seissler for prior studies that he and AMS had performed, and for references. My recollection is that Mr. Seissler referred us to two major projects, one for the Commodity Futures Trading Commission, and another for the Department of Agriculture."

Now, were these studies that Mr. Seissler said he had performed or that AMS had performed?

Ms. LIEBELER. They were AMS studies, and it was my understanding that Mr. Seissler worked on those studies.

Senator LEAHY. I see, and you noted that you had asked him for references. Did he give you any?

Ms. LIEBELER. He gave us the two studies.

Senator LEAHY. Other than the two studies?

Ms. LIEBELER. The two studies, and we followed up on these studies because at that lunch Mr. Seissler mentioned, as the narrative says, that the then Chairman of the ITC, Chairwoman Stern, was negotiating through GSA a contract with AMS for an office automation study.

In that context Commissioner Lodwick and I, because both of us were interested in office automation, asked for references and examples of AMS studies.

Senator LEAHY. Did you or Mr. Lodwick ask him for any résumé?

Ms. LIEBELER. Not a written résumé, but we did discuss his background, and I believe that he may have given us some materials on AMS, although my recollection is not clear.

Senator LEAHY. Now, in May 1986 you had called him again and he had told you that he left—he, Mr. Seissler, had left AMS and was with a new firm, MDS. Did you ask him why he left AMS?

Ms. LIEBELER. Actually, I did, Senator.

Senator LEAHY. And what did he say?

Ms. LIEBELER. He said that he had an opportunity to join a new consulting firm and at the same time he had some disappointments with his prior firm and he felt he could work better in a new environment.

Senator LEAHY. Did you ever check that out with AMS?

Ms. LIEBELER. Not at that time, but when AMS was on the ITC premises after I became Chairman, I asked Mr. Michael Smith, the staff person who was the contracting officer's technical representative on the AMS contract, to check and see what had gone on at AMS. Mr. Smith reported back to me that he was told that Mr. Seissler left AMS for a new business opportunity and that perhaps Mr. Seissler had not had a very good personal relationship with one of the other AMS partners. But nothing was brought to my attention to suggest there was anything unusual or difficult about Mr. Seissler's parting from AMS.

Senator LEAHY. Now, you and Vice Chairman Brunsdale met twice with Mr. Seissler and Mr. Sokol——

Ms. LIEBELER. Correct.

Senator LEAHY. His business associate, in May of 1986. Mr. Seissler had repeated his representations about his credentials. At that time, did any of you ask him who gave him the Ph.D.?

Ms. LIEBELER. I don't remember asking where his Ph.D. was from, although I may have, Senator.

Senator LEAHY. Did you ever find out anything about the Ph.D.?

Ms. LIEBELER. Well, we later learned that he did not have the credentials that he said he had.

Senator LEAHY. Your narrative stated that you asked Messrs. Seissler and Sokol what MDS would charge to do a management study of your responsibilities under the Integrity Act. They offered to do such a study for a sum not to exceed $25,000. How did you arrive at this figure of $25,000?

Ms. LIEBELER. I described the kind of study I wanted. I described the time frame of the study, when I expected the report, and asked what they would charge for that. And they said that they thought something like that would run a little less than $25,000.

Senator LEAHY. Now, ITC contracts under $25,000 may be entered into without competition or seeking quotations from more than one source, is that correct?

Ms. LIEBELER. Senator, I once thought that that was the case, but I'm not sure that that is an accurate description of procurement regulations. I think you can go over $25,000 as well. I mean, the $25,000 isn't the key, although at one time I thought it was.

Senator LEAHY. Under $25,000, though, they can be entered into without competition or seeking quotations from more than one source, is that correct?

Ms. LIEBELER. My present understanding of Federal procurement regulations is that a government agency can use sole-sourcing for one of several different reasons—if there is only one unique source; unusual urgency; special engineering and research; some kind of international agreement; if there is a statute authorizing it; national security; or in the public interest.

Senator LEAHY. But ITC could enter into contracts for under $25,000 without competition or seeking quotations from more than one source?

Ms. LIEBELER. Under certain circumstances.

Senator LEAHY. Under certain circumstances, okay. Were you aware what those circumstances were at the time this contract was entered into?

Ms. LIEBELER. Senator, my understanding at the time the contract was entered into, which I based on what my Director of Administration, the person responsible for contracting and procurement told me, was that contracts under $25,000 could be entered into without competition.

Senator LEAHY. Was Mr. Seissler aware of that?

Ms. LIEBELER. Excuse me. Was Mr. Seissler aware of what, my understanding?

Senator LEAHY. That contracts under $25,000 could be entered into without competition and from sole source.

Ms. LIEBELER. That was my understanding? I think that was Mr. Seissler's understanding, my understanding, and the head of our Office of Administration's understanding. But, Senator, just so the record is clear, I am not sure that that is an accurate description of what procurement regulations are.

Senator LEAHY. I was going by your narrative to us, in which you say Mr. Goodrich, the Director of Administration, quote, "advised me that the Commission could contract for up to $25,000 without going through competitive bidding."

Ms. LIEBELER. That's what I was told and that's what I believed at the time.

Senator LEAHY. Now, when did you decide that ITC should enter into a contract with MDS?

Ms. LIEBELER. Before I became Chairman of the ITC, I was aware that I would become Chairman on June 16, 1986. I had been Vice Chairman of the agency for 2 years and been sitting as a commissioner since April of——

Senator LEAHY. Did you consult with any of the other commissioners about your decision?

Ms. LIEBELER. Yes, I did, Senator.

Senator LEAHY. Who?

Ms. LIEBELER. I consulted with Commissioner Brunsdale extensively on this matter; she was about to be named, and was named, Vice Chairman.

Senator LEAHY. Did you tell the outgoing Chairman, Paula Stern?

Ms. LIEBELER. I did not discuss this with Paula Stern. I had discussed Mr. Seissler and his background and credentials with Commissioner Lodwick, and I think both of us thought that Mr. Seissler seemed knowledgeable and competent.

Senator **Leahy**. Did you discuss it with Commissioner Eckes or Rohr? I probably have mispronounced their names terribly.

Ms. **Liebeler**. That's all right. No, I did not, although when the purchase order was signed I told other commissioners that I had entered into a management consulting contract with MDS. The principals of MDS interviewed Commissioner Eckes and Commissioner Lodwick. I had asked them to interview all past Chairmen of the Commission, but Mr. Seissler told me that Commissioner Stern was unavailable.

Senator **Leahy**. At any time prior to entering into this contract, did you discuss either with Mr. Seissler or Mr. Sokol what conclusions their report should contain?

Ms. **Liebeler**. The precise conclusions of the report? No, except that I shared with them some concerns I had about agency management, and I did expect, Senator, that the report would recommend an audit because it was very clear that the Commission was long overdue for installing in-house audit procedures.

Senator **Leahy**. Did you tell them that you thought the administrative structure of ITC needed to be revamped prior to their study?

Ms. **Liebeler**. I did not say that, but in talking to them about ITC administration, I said that I found it somewhat difficult to run an agency without an audit program and without an executive director. I also shared with them my concerns about office automation, particularly about the fact that the agency's personal computers and mainframe computers were not being properly supervised.

Senator **Leahy**. Did you tell them there should be a single executive director answerable to the Chairman?

Ms. **Liebeler**. I told them I thought that the establishment of an executive director's position was an appropriate management structure, and I would point out that it is not an unusual management structure. Many—in fact, most Federal agencies have executive directors, although not all; most do.

Senator **Leahy**. Did you identify to them any of the career staff of the ITC who you felt were impeding the efficient management of the agency?

Ms. **Liebeler**. Not in those terms, Senator. I shared with them what I thought were the——

Senator **Leahy**. Well, in any terms. Did you give them, in effect, a hit list?

Ms. **Liebeler**. Oh, no.

Senator **Leahy**. Did you give them some names of some people in the agency that you felt they should be looking at specifically, for whatever reason?

Ms. **Liebeler**. I gave them an organizational chart with the names of our senior managers and suggested that they talk to our senior managers.

Senator **Leahy**. Did you point out particular people either by name or by title who you felt were not doing the kind of work that you wanted them to do at ITC?

Ms. **Liebeler**. I suggested to them that certain managers seemed weak to me. But, Senator, I was well aware of a statutory provision that would have prevented me from making any management changes of the kind that I think you're suggesting without the approval of a majority of the Commission.

So I couldn't have created a "hit list." Under the statute I couldn't have made management changes without approval of a majority of the Commissioners.

Senator **Leahy**. Did you tell them that you had suspicions of fraud, waste or abuse in the ITC procurement operations?

Ms. **Liebeler**. No, but I told them that I was concerned about the conditions under which ITC procurement operations were being handled. I questioned whether these procedures gave me any assurance that there was no fraud, waste or abuse. I had no idea whether there was or was not waste, fraud or abuse.

Senator **Leahy**. Did you suggest to them that there were certain people that they should look at in answering those kind of questions?

Ms. **Liebeler**. No.

Senator **Leahy**. You submitted to the committee a document entitled "Discussion Outline, May 26, 1986." Do you know who prepared that document and for what purpose?

Ms. **Liebeler**. Your staff gave me a copy of the materials you were going to refer to. Let me take a look and see if I can find——

Senator **Leahy**. I'm referring to a document that you gave us entitled "Discussion Outline, May 26, 1986."

Ms. **Liebeler**. Senator, I gave a lot of materials to the committee.

Senator **Leahy**. Sure.

Ms. **Liebeler**. And I didn't want to walk in here with six binders. I think that your staff was kind enough to give me a copy of that document, but the materials your staff gave me today are not indexed and I'm trying to find it.

You might ask your staff if that particular document was included in the material that they gave me. I don't see it. I'd be happy to refresh my recollection because I'm sure I gave you a copy of something like that.

Senator **Leahy**. We'll try and get you an extra copy if you'd like.

Ms. **Liebeler**. Wait a minute. I think I may have found it. Are you referring to something which says "Discussion Outline, May 26, 1986?"

Senator **Leahy**. I will include it in the record at this point.

[Aforementioned material follows:]

DISCUSSION OUTLINE

[redacted]

I. IMMEDIATE STAFFING REQUIREMENTS

Executive Director:

Director, Office of Finance and Budget:

Director, Office of Operations:

Director, Office of Administration:

Director, Office of Personnel:

Director, Office of Investigations:

Director, Office of Industries:

II. MANAGEMENT, ADMINISTRATION AND CONTROL RECOMMENDATIONS

1. Management Compliance and Control Responsibilities
    - subject to government review and regulation
    - necessary for effective management performance
2. Current Compliance and Control Capabilities
    - current business practices for budgeting, procurement and management (e.g., capital asset/inventory control)
    - management reporting (e.g., status and performance reports)
3. Recommendations for Improving Management, Administration and Control
    - immediate containment of further erosions of

management awareness, oversight and control

- on-going systems and reporting solutions

4. Deliverables (Draft and Final Reports)

   - annotations of Federal initiatives, regulations and guidelines

   - compliance and control capabilities status report

   - recommendations for management controls, administrative systems and staffing requirements

5. Professional Fees and Schedule of Completion

   - professional fees: not to exceed $25,000

   - schedule of completion: June 16, 1986 - July 15, 1986

Senator **Leahy**. That's it.

Ms. **Liebeler**. Yes, I did furnish that to you.

Senator **Leahy**. Do you know who prepared that document?

Ms. **Liebeler**. I did not prepare it.

Senator **Leahy**. Do you know who did?

Ms. **Liebeler**. I don't know who prepared it, but it was given to me by Alan Seissler and Marshal Sokol, who——

Senator **Leahy**. Why? Do you know why they gave it to you?

Ms. **Liebeler**. We were discussing the kind of management study that might be useful to the Commission and to me as Chairman. I had given them an organizational chart and it looks to me like what they did is take from that organizational chart a list of most of the senior managers and put immediate staffing requirements and put above these job titles.

Senator **Leahy**. Well, in fact, the first entry under that heading is "executive director" on this May 26, 1986 outline. Did that position exist at that time?

Ms. **Liebeler**. No, it did not.

Senator **Leahy**. The next heading is "Management, Administration and Control Recommendations." Whose recommendations were these?

Ms. **Liebeler**. Again, Senator, I did not prepare this. MDS prepared this and it was, at best, a discussion outline. I don't think that these were recommendations. They were discussions of possible kinds of things that could be in a management study.

Senator **Leahy**. Well, in that case was one of the purposes of the study to propose this executive director, which is the number one item up here under Immediate Staffing Requirements?

Ms. **Liebeler**. Not particularly, Senator. The purpose of the study was to look at my responsibilities under the Federal Managers Financial Integrity Act. I had the responsibility as Chairman for certifying the adequacy of the Commission's internal and financial controls for a 12-month period, of which I would have been Chairman 2 or 2½ months, and there was no audit program in place.

I wanted MDS to take a look and see the kind of study that they'd have to do to give me some recommendations about my responsibilities under the Integrity Act.

Senator **Leahy**. On the second page there's an entry, Deliverables, Draft and Final Reports, and a final entry, Professional Fees and Scheduled Completion. Under that it appears, "Professional fees not to exceed $25,000."

Is this a draft of the contract that you eventually entered into with MDS?

Ms. **Liebeler**. No. It was a discussion outline and nothing more than that.

Senator **Leahy**. Okay, let's go to June 17, 1986. That was your first day as Chairman, is that correct, of the ITC?

Ms. **Liebeler**. That's right.

Senator **Leahy**. And did you call Loren Goodrich, the ITC Director of Administration, to your office at about 10:30 that morning?

Ms. **Liebeler**. I sure did.

Senator **Leahy**. Was Mr. Seissler in your office at that time?

Ms. **Liebeler**. Yes, he was.

Senator **Leahy**. Did you tell Mr. Goodrich to draw up the necessary papers to enter into a consulting contract with MDS?

Ms. **Liebeler**. I told Mr. Goodrich that I would like the Commission to enter into a consulting contract with MDS and I asked him to do what was necessary to do that and I asked him how to do it. He told me that I should write him a memorandum and he helped me draft, essentially he suggested how I should draft the memorandum to him.

Senator **Leahy**. Had you told him when you wanted it done by?

Ms. **Liebeler**. Had I told him when I wanted the contract done by?

Senator **Leahy**. Yes. Did you tell Mr.——

Ms. **Liebeler**. July 30, 1986.

Senator **Leahy**. Now, this was in——

Ms. **Liebeler**. I'm sorry. I might not understand your question, Senator. Did I tell him——

Senator **Leahy**. You met on June 17th——

Ms. **Liebeler**. That's right.

Senator **Leahy** [continuing]. With Mr. Seissler and Mr. Goodrich. You said you had told Mr. Goodrich to draw up the necessary papers to enter into a consulting contract with MDS. Did you tell him when you wanted them done by?

Ms. **Liebeler**. The papers done by?

Senator **Leahy**. Yes.

Ms. **Liebeler**. Oh, I'm sorry. I thought you meant the study completion date. Yes. I asked Mr. Goodrich to do them as quickly as he could.

Senator **Leahy**. Did you tell him you wanted them done that morning——

Ms. **Liebeler**. If it were possible.

Senator **Leahy** [continuing]. Or the later part of that day?

Ms. **Liebeler**. If it were possible, yes.

Senator **Leahy**. Now, the paperwork you said Mr. Goodrich explained that he needed—you've given us a memorandum from you to Mr. Goodrich dated June 17, 1986, and it lists the tasks, the dates for completion, and other information. It designates you as the contracting officer's technical representative.

Is that the paperwork Mr. Goodrich said he needed?

Ms. **Liebeler**. That's the paperwork he said he needed from me.

[Memorandum follows:]

CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

JUN 17 1986

TO: Director, Office of Administration

FROM: Chairman Liebeler Susan Liebeler

SUBJ: MDS Consulting Firm to Conduct a Management Study

Please initiate a purchase order to the "MDS Consultants, Inc." in the amount of $24,750.00. This firm will be conducting a study for my office in connection with the "Federal Managers Financial Integrity Act" of 1982.

The Management Study is necessary to advise me of management, administration, and control responsibilities which are relevant to my responsibilities under the Federal Managers Financial Integrity Act of 1982.

The study is scheduled to be conducted during the time period June 17th through July 30th 1986.

The following is a statement of the deliverables, and tasks that are to be performed by the MDS Consulting Firm:

TASK 1:

Determine Management, Administration, and Control requirements of the Chairman's Office which are applicable to statutes, regulations and guidelines.

TASK 2:

Recommend improvements of the Chairman's responsibilities in regard to Management and Administration.

DELIVERABLES:

Written Progress Report and Briefing	6/24/86
Oral Progress Briefing #1	7/01/86
Oral Progress Briefing #2	7/08/86
Recommendations Briefing	7/14/86
Final Written Draft Report	7/21/86
Final Written Study Report	7/30/86

35 & 5L

MDS will invoice the Commission for ~~50%~~ of the study cost on 6/24/86, based upon the use of ~~50%~~ 65 of the overall resources. The final payment will be invoiced upon completion of the study on 7/30/86.

CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (COTR):

I am appointing myself as the COTR for this procurement. Because of the nature of the deliverables requested, it will be necessary for me to certify and accept same.

Senator **Leahy**. Did he tell you that he needed a capability statement from the contractor?

Ms. **Liebeler**. Mr. Goodrich told Mr. Seissler that he needed a capability statement. I was there when he said it.

Senator **Leahy**. What does that mean? What's a capability statement?

Ms. **Liebeler**. Senator, at the time I did not really know what a capability statement was and I asked Mr. Goodrich exactly what that was and he told me that these are the kinds of things that the Office of Contracting and Procurement and the contracting officer will need to enter into the contract.

It seemed to be some magic procurement language; Mr. Seissler certainly seemed to understand it and said he would furnish one.

Senator **Leahy**. And did he?

Ms. **Liebeler**. Not to me; I believe he furnished such a document to Mr. Goodrich. Perhaps he also gave a copy to me. My recollection is that he did give me a copy.

Senator **Leahy**. Now, did Mr. Goodrich get the contract drawn up by the end of that day?

Ms. **Liebeler**. It was a purchase order, and the answer is yes. It was a one-page purchase order.

Senator **Leahy**. And was the capability statement in by the time the——

Ms. **Liebeler**. My understanding is it was. I never heard otherwise.

Senator **Leahy**. Did Mr. Goodrich tell you the contract couldn't be entered into until the capability statement was received?

Ms. **Liebeler**. I don't think he put it like that. He said to do this we need a capability statement, and I don't think there was any issue about MDS furnishing one, or at least not that I knew of.

Senator **Leahy**. Well, was the agreement entered into before or after the capability statement arrived?

Ms. **Liebeler**. I didn't sign the purchase order, Senator.

Senator **Leahy**. Okay.

Ms. **Liebeler**. Our contracting officer signs that.

Senator **Leahy**. Do you know the answer to that question, though? Do you know whether it was entered into before or after the capability statement arrived?

Ms. **Liebeler**. Senator, I don't know.

Senator **Leahy**. Okay. Did you eventually see the statement?

Ms. **Liebeler**. I think I've seen a copy of it.

Senator **Leahy**. Were you satisfied——

Ms. **Liebeler**. I know I've seen a copy of it, Senator.

Senator **Leahy**. Were you satisfied with it?

Ms. **Liebeler**. Senator——

Senator **Leahy**. Were you satisfied that it demonstrated the capabilities of the contractor?

Ms. **Liebeler**. I thought that the contracting party, MDS, was capable of performing the contract. I relied on my procurement people to tell me what was sufficient for a capability statement.

Senator **Leahy**. MDS said they had performed "strategic planning, audits, and financial management work for major domestic and international institutions". Did they say what institutions that referred to?

Ms. **Liebeler**. Are you referring now, Senator, to the capability statement?

Senator **Leahy**. Yes.

Ms. **Liebeler**. I think I have a copy of that. I'd like to take a minute to——

Senator **Leahy**. Sure, of course.

Ms. **Liebeler**. I think it was given to me in the materials furnished me today. Senator, I'm looking at a letter of June 17, 1986, on the letterhead of MDS Consultants, Inc. That is what you're referring to, isn't it?

Senator **Leahy**. The capability statement. In fact, it's short enough; let me just read it.

Ms. **Liebeler**. Okay.

[Capabilities statement follows:]

MDS
CONSULTANTS, INC.

CAPABILITIES STATEMENT

Since 1972, MDS Consultants has specialized in strategic planning, management audits and controls, and financial management systems for major domestic and international financial institutions, "Fortune" size companies and government agencies.

The firm and its principals have published numerous professional articles, monographs and books and serve as faculty of universities and professional symposiums.

P.O. Box 8069 Silver Spring, Maryland 20907 (301) 565 2270

Senator **Leahy**. I'll just read it for the record. It says—here is the whole capability statement that I have. It's undated and it says,

> Since 1972, MDS Consultants has specialized in strategic planning, management audits and controls, and financial management systems for major domestic and international financial institutions, 'Fortune' size companies, and government agencies. The firm and its principals have published numerous professional articles, monographs, and books, and serve as faculty of universities and professional symposiums.

Did that seem just a tad thin to you?

Ms. **Liebeler**. Senator, I did not rely on the capability statement in deciding that MDS was qualified to do the work.

Senator **Leahy**. Looking at it today, does it appear a tad thin?

Ms. **Liebeler**. I'd have to look at other capability statements to answer that question. The capability statement was enclosed with a letter of June 17 which set forth several project references. I also had in my possession a copy of about 14 studies and monographs, that were background materials concerning MDS Consultants, Inc.

Senator **Leahy**. Did you check any of the project references?

Ms. **Liebeler**. I did not check the project references there.

Senator **Leahy**. Did somebody?

Ms. **Liebeler**. That would be the procurement office's responsibility. But, Senator, I had checked with the Commodity Futures Trading Commission about a prior study which Mr. Seissler had done, albeit an AMS study. I checked that one out myself.

Senator **Leahy**. AMS, but not MDS?

Ms. **Liebeler**. AMS, a different firm, that's correct. It was the firm with which Mr. Seissler was previously affiliated as a principal.

Senator **Leahy**. Let me just ask you a hypothetical. Would you feel that taking solely what I've read as a capability statement—would you feel that that gives an adequate picture of MDS?

Ms. **Liebeler**. If this were the only thing I knew about MDS, I would not be willing to hire someone just based on this.

Senator **Leahy**. Thank you.

Did Mr. Seissler or Mr. Sokol ever say what these universities were where they taught?

Ms. **Liebeler**. Excuse me?

Senator **Leahy**. This statement speaks of the principals having taught at universities. Did they ever mention to you where those were that you recall, if you recall?

Ms. **Liebeler**. I'm trying to recall. Some of the materials furnished to us by Mr. Sokol may have included a course outline for a course or panel discussion at a university. I don't recall asking them what universities these were, but I have some vague recollection that if I pulled out one of these eleven documents I would see that the course of program was given at a particular school.

Senator **Leahy**. Obviously, we're going to keep the record open, so you have plenty of time if you want to go back and look at that. If you do find something, feel free to add that.

I'm looking at your narrative again. On July 21, 1986, according to your narrative, you received a draft report from Mr. Seissler, and you say you were concerned that "while the conclusions of the report seemed sound, the report failed to describe adequately the evidence supporting these conclusions."

What do you mean by "the conclusions seemed sound?" What was it about the conclusions that seemed sound to you?

Ms. **Liebeler**. Let's talk about a few of the conclusions——

Senator **Leahy**. Sure.

Ms. **Liebeler**. And perhaps by example I can explain to you what I meant. One conclusion of the report was that the Commission should issue an RFP for audit services. I thought that was certainly a very sound conclusion.

Senator **Leahy**. And you could feel it was even without evidence supporting the conclusion?

Ms. **Liebeler**. There wasn't as much evidence in there to support the conclusion as there should have been, but I was aware that GAO, certain congressional committees, the Financial Integrity Act, and OMB management circulars required the Commission to set up an audit program.

The committees and GAO had asked prior Chairmen to institute such a program as early as 1982.

Senator **Leahy**. What were some of the other conclusions?

Ms. **Liebeler**. Another concluson is that quality assurance standards are needed for economic studies and industry studies. That's not an unreasonable conclusion and I had some concern about the lack of standard methodological frameworks in some ITC studies.

I was not surprised by the recommendation, but at the same time if someone is going to make a recommendation like that, they have got to back it up. Just to state the recommendation without stating the background facts on which that judgment is made is not particularly useful.

I told Mr. Seissler and Mr. Sokol that if they wanted to make that statement, they should state what they based it on.

Another recommendation was that the Commission should review the Office of Management Service's resource requirements. I was aware that there was some concern among Commission staff about the quality of services being delivered by the Management Services people. Management Services seemed to have a lot of staff, but the level of service was not very good. There was considerable dissatisfaction amongst the program staff with the level of service provided by Management Services.

But, again, just a statement that the Commission should review resource requirements in that area without stating from whom MDS had heard complaints and what the nature of the complaints was, was not very useful.

The kind of substantiation that would have been helpful to evaluate the validity of the recommendation would be a description of what they based it on.

Senator **Leahy**. Now, that was on July 21, but on July 29, even with these apparent lacks in their report, you did enter into another contract with them for $17,950 to assist in preparing your agency's budget request, is that correct?

Ms. **Liebeler**. To assist me in the budget process. That is correct, Senator, but no services were ever rendered under that contract and it was canceled.

Senator **Leahy**. Did you try getting further information about Mr. Seissler's credentials before entering into the second contract?

Ms. **Liebeler**. No. I had no reason to do so. Senator, let me make clear that my dissatisfaction with the draft report was not of an egregious nature. I really believed that these people were what they said they were and that their final work product would be a good one.

I was concerned that the draft report wasn't particularly well written. When I asked Mr. Sokol and Mr. Seissler to substantiate their conclusions at a meeting with the Vice Chairman and some members of my personal staff, they provided oral substantiation for many of their conclusions. I assumed the substantiation they provided orally would be contained in the final report.

Senator **Leahy**. But you thought enough of the report on August 1 to send it to the staff of the congressional oversight committees with a cover letter saying that the study identified management problems that you believed could be remedied if appropriate action is taken and the issue remains nonpartisan. Is that correct?

Ms. **Liebeler**. Senator, I believed that to be true. The recommendations themselves were not on their face unsound and I——

Senator **Leahy**. Well, you also had circulated the report to your fellow commissioners that same day and four of the five wrote back that very same day expressing concerns about the report, noting the report was unsigned and contained no information about the credentials of the authors.

Were you surprised to get this kind of instantaneous reaction from your fellow commissioners?

Ms. **Liebeler**. Senator, I was surprised that they thought I was ready to take action on the report. There was some suggestion in their response that I would move forward on this report without consultation. I was in Vermont, Senator, on August 1. I called each commissioner, and was only able to reach two of them. I had my staff talk to the staff of others that I could not reach. I assured them I had no intention of moving forward on this report without discussing its recommendations with the Commissioners.

I was certainly aware, as I've always been, of the need to consult with the Commissioners on management actions of this type.

Senator **Leahy**. I will place the documents I have referred to in the record.

[Aforementioned material follows:]

CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

HAND DELIVER

August 1, 1986

Rufus Yerxa
Subcommittee on Trade
Committee on Ways and Means
U.S. House of Representatives
1136 Longworth House Office Building
Washington, D.C. 20515

Dear Rufus:

As new Chairman of the ITC, I hired MDS Consultants, Inc. to provide advice on whether the Commission is in compliance with federal laws and regulations concerning financial management and procurement. The primary finding of the study is that the Commission generally does not operate in accordance with the Federal Managers Financial Integrity Act (FMFIA). I am enclosing a copy of the study prepared by MDS and a copy of a memorandum prepared by Rick Arnold, Director of Finance and Budget for the ITC. Both the study and Mr. Arnold recommend that commercial audit services be engaged. I have put out a request for bids on such services.

I have provided you with these documents for your information. I believe that the management problems can be remedied if appropriate action is taken and the issue remains non-partisan. If you would like to meet to further discuss the study or its recommendations, feel free to call. I have already contacted your colleagues on the Senate side and am sending an identical letter to Thelma Askey.

Sincerely,

/SL/

Susan Liebeler

CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

HAND DELIVER

August 1, 1986

Thelma Askey
Committee on Ways and Means
U.S. House of Representatives
1106 Longworth House Office Building
Washington, D.C. 20515

Dear Thelma:

As new Chairman of the ITC, I hired MDS Consultants, Inc. to provide advice on whether the Commission is in compliance with federal laws and regulations concerning financial management and procurement. The primary finding of the study is that the Commission generally does not operate in accordance with the Federal Managers Financial Integrity Act (FMFIA). I am enclosing a copy of the study prepared by MDS and a copy of a memorandum prepared by Rick Arnold, Director of Finance and Budget for the ITC. Both the study and Mr. Arnold recommend that commercial audit services be engaged. I have put out a request for bids on such services.

I have provided you with these documents for your information. I believe that the management problems can be remedied if appropriate action is taken and the issue remains non-partisan. If you would like to meet to further discuss the study or its recommendations, feel free to call. I have already contacted your colleagues on the Senate side and am sending an identical letter to Rufus Yerxa.

Sincerely,

/SL/

Susan Liebeler

COMMISSIONER

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

August 1, 1986

The Honorable Susan Liebeler
Chairman
U.S. International Trade Commission
Washington, D.C. 20436

Dear Susan:

We have received copies of the MDS Consultants Inc.'s final report. Among the recommendations, we note that MDS has proposed reinstatement of the position of Commission Executive Director, a reorganization of the Commission staff, quality assurance standards for economic and industry studies, and an outside audit of accounting and other records.

These are far-reaching proposals, and need to be evaluated and discussed fully by members of the Commission. We insist that any effort to implement any of the report's recommendations be suspended until the Commission has had full opportunity to review these recommendations and talk with the authors. Regarding administrative matters, we note that pursuant to 19 USC 1331(a)(1) "Any decision by the chairman . . . shall be subject to disapproval by a majority vote of all the commissioners in office."

We also note that the report is unsigned -- containing no information about the consulting experience of the firm selected to provide these recommendations and no data about the authors. We request this information along with any interim reports that MDS may have provided the Chairman.

Sincerely yours,

Paula Stern

Seeley Lodwick RPS

Alfred Eckes

Alfred Eckes

David Rohr

Senator **LEAHY**. So did you ask Mr. Seissler for more information at that point about his credentials?

Ms. **LIEBELER**. I asked Mr. Seissler to make himself and Mr. Sokol available to the Commissioners for questions on various aspects of the report. I provided the Commissioners with an experience vita, the background material that I had of the firm, and the projects the firm had done.

The Commissioners wanted an educational vita and I asked Mr. Seissler to provide the Commissioners with an educational vita of both himself and Mr. Sokol. Mr. Seissler assured me that the vita would be forthcoming.

Senator **LEAHY**. Your narrative says on August 20 you talked with Mr. Seissler by phone. You asked him about the résumé he had dictated over the phone to your secretary that very day.

What made you suspicious about his credentials at that point?

Ms. **LIEBELER**. Senator, I don't know how to explain it any better than to tell you that I had been a law professor for many years and I had heard a lot of excuses and stories from students. Mr. Seissler told me on the phone that he couldn't give me his vita because his hard disk had crashed.

Senator **LEAHY**. His what?

Ms. **LIEBELER**. His hard disk had crashed and he could not give me——

Senator **LEAHY**. Sort of like——

Ms. **LIEBELER**. It's computer-eze.

Senator **LEAHY**. My dog ate my term paper.

Ms. **LIEBELER**. That was exactly my reaction. I thought, oh, dear, his dog ate his paper. That is exactly what I thought and that is when I said, "Well, Mr. Seissler, my secretary is right here. You can dictate a résumé to her." And he said he would call back and do so, and he did so.

I looked at the résumé my secretary had typed from Mr. Seissler's dictation and I spoke with Mr. Seissler about it. This was all within a very short period of time.

Senator **LEAHY**. Well, was any of the information in this résumé inconsistent with what he had told you before?

Ms. **LIEBELER**. The résumé was consistent with the information he had given me before about his degrees and his education.

Senator **LEAHY**. For example, he said he had an MBA from Harvard.

Ms. **LIEBELER**. Yes. It was a great-looking résumé.

Senator **LEAHY**. I will put this résumé in the record.

[Résumé follows:]

Doc. No. 0109p

ALAN L. SEISSLER
P.O. Box 8069
Silver Spring, MD 20907
(301) 565-2270

EXPERIENCE

1986 MDS Consultants, Inc., Silver Spring, MD

Vice President, Client Services--Responsible for the consulting practice of MDS. Clients include federal agencies, the top 50 financial institutions in the United States, Japanese Minister of Trade, and other Fortune 500 corporation clients.

1984-1986 American Management Systems, Arlington, VA

Principal Director of Activities of Financial Activities--Headed the financial systems practice for AMS. This practice serviced non-defense governmental agencies in Washington, DC, New York, NY, Chicago, IL, and Philadelphia, PA. Supervised activities of all accounting systems--analysts, auditors, and financial consultants for AMS.

1982-1983 Mitre Corporation, McLean, VA

Group Leader--Responsible for the management of the Mitre Corporation's consulting engagements in non-defense, US Government agencies. Supervised the activities of up to 60 professional consultants. Director of Mitre computer laboratory.

1981 Student Loan Marketing Association

Director, Loan Administration; Director, Information Services Division--Responsible for planning and organizing the inhouse management of loan accounting functions. As Director of Information Services Division, responsible for bringing all computer resources in-house. PLanned, staffed and purchased for information center consisting of IBM 4300 mainframe and supporting hardware, etc. Supervised activities of 40 loan accountants and 62 data processers.

EXHIBIT B
Page 1 of 2

1973-1981 Federal National Mortgage Association, Washington, DC

Supervisor, EDP, Manager, EDP, Manager, Loan Administration, Director, Loan Administration--Responsible for the administratioin of the entire loan accounting and reporting functions of FNMA. Controlled assets of up to 70 billion dollars. Supervisor of activities for 115 professional accountants and system analysts.

1969-1973 First National City Bank (Citicorp)

Assistant Treasurer, Audit Division--Supervised financial EDP audits of headquarters activities.

EDUCATION

BS, Major in Accounting--Fordham University, New York, NY, cum laude

Honorary Diploma of Distinction, Art and Literature--Royal Academy, Antwerp, Belgium

Diploma of Completion, Major in Mathematics, Heidelberg University, Heidelberg, Germany

MBA, Harvard University

PhD, The University Consortium of Washington

SCHOLARSHIPS

Veterans of Foreign Wars, New York Region

Morgan Library Trust

ASSOCIATIONS

Founding Membership, EDP Audit Society of the United States of America

American Institute of Certified Public Accountants

American Management Association

OTHER AFFILIATIONS

Trustee, The Morgan Library, New York

Gugenheim Foundation, New York, NY, and London, England

PERSONAL

Born December 15, 1946, New York, NY

Married

Residence--Rockville, MD, and New York, NY

EXHIBIT B
Page 2 of 2

Senator LEAHY. Let's see. He had an MBA from Harvard; a Ph.D. from the University Consortium of Washington; honorary diploma of distinction in art and literature from the Royal Academy of Antwerp, Belgium; a diploma in mathematics from Heidelberg University in Germany. But on August 20 he admitted to you he had no Ph.D., is that correct?

Ms. LIEBELER. Senator, he did not admit it readily.

Senator LEAHY. But he did admit it?

Ms. LIEBELER. Eventually, when I spoke with him on the phone and I told him that "it sounds like the dog ate your homework and I just don't, I just can't, believe this."

Senator LEAHY. Did he admit that anything else in the résumé was false?

Ms. LIEBELER. At that time he told me that he didn't have a Ph.D.

Senator LEAHY. Did he tell you he didn't want to meet with Commissioner Stern for any reason?

Ms. LIEBELER. Not on the telephone, but in my office. He showed up in my office a few minutes later. I was in a meeting in the Vice Chairman's office and he asked to see me.

I went to my office with Mr. Seissler and he said that he was sorry that he had lied about his credentials and he was sorry that he had embarrassed me. He said that he thought he would just disappear at that——

Senator LEAHY. Tell me about the Stern remark, the Commissioner Stern remark.

Ms. LIEBELER. The remark was made in response to a statement I made to him. I want it to be clear. I asked Mr. Seissler to leave the building and noted that he had been making it very difficult for Commissioner Stern and other Commissioners to set up appointments with him to ask questions about the MDS report.

I said "If you don't care enough for your professional reputation to answer questions about the report, I can't help you." I also said that I had never heard of a consultant not answering questions about his report. I said "I don't understand why you can't accommodate Paula Stern's request for meetings. This is outrageous."

And he said, something like, "Susan, you have to understand I'll hurt her," or "I'll hit her," or something to that effect.

Senator LEAHY. Did he say what that——

Ms. LIEBELER. Pardon? That was a little weird.

Senator LEAHY. That was somewhat outside the normal type of conversation one would have. [Laughter.]

Ms. LIEBELER. Senator, I was sitting in a chair and he was sitting in a chair opposite me and the door was behind him. At that point, yes, I thought that it was a little bizarre and I was quite anxious to move around him and out the door.

Senator LEAHY. I know those feelings. I recall once coming up to a man much larger than I when I was campaigning. I knew I recognized him. I couldn't place him. I thought I'd make some small talk, so I said to him, "How are things going?"

He says, "Well, not too good." He said, "You know, when you were a prosecutor, after you convicted me and I went to prison and my wife left me"—I said, I mean, other than that, of course. [Laughter.]

Now, at about this point you stopped payment on the final installment on the original MDS contract. You canceled the second contract. You asked the Justice Department to look into possible fraudulent activity against the Government, did you not?

Ms. **Liebeler**. Yes, Senator, but there was something else that occurred that made me take that action.

Senator **Leahy**. What's that?

Ms. **Liebeler**. When I asked Mr. Seissler to leave the building, he had a key to a file cabinet in my office. I had furnished him with a desk in a corner of an office in my suite at which he was working and a file cabinet, and the file cabinet had a lock on it.

I asked Mr. Seissler to give me his building pass, which we typically give consultants who are working in the building. I also asked him for the key to the file cabinet. I unlocked the file cabinet in his presence and there were materials in one of the drawers, a large loose leaf notebook.

One of the lawyers on my personal staff was also in the room and I said, "What is this?" pointing to the notebook. And the notebook turned out to be some missing Commission records. The notebook contained certain accounting records. At the request of Mr. Rick Arnold, the Director of Finance and Budget, I had previously asked Mr. Seissler several times if he had seen these records and each time Mr. Seissler had denied having seen them.

When I asked him what the notebook contained he said, "well, those are the records I was hiding; I wanted to make trouble for Rick Arnold, but now it's not worth it," or something to that effect. I found that statement to be as bizarre as his comment about Paula Stern.

Mr. Seissler's credibility was at issue. At that point I had no idea if Mr. Seissler had done the work that the final report of MDS represented had been done. For example, I did not know whether he sampled the purchase orders that he represented he had sampled in the report or not.

Senator **Leahy**. And in retrospect, Mr. Seissler was not a model consultant. Would that be a fair statement?

Ms. **Liebeler**. I'm not going to disagree with that, Senator.

Senator **Leahy**. Hindsight is 20-20 always, but thinking back, do you think there were things in there that should have made you yank him quicker?

Ms. **Liebeler**. Senator——

Senator **Leahy**. I mean, I applaud your turning it over to the Justice Department and everything else.

Ms. **Liebeler**. Yes.

Senator **Leahy**. You did everything right there. I'm not suggesting any question otherwise, and I wasn't there. I mean, I obviously wouldn't know this man if he walked into my office. I hoped he wouldn't walk in my office from what I've heard of him. [Laughter.]

But what do you think now, looking back?

Ms. **Liebeler**. Senator, I had absolutely no inkling of this kind of a problem until the hard disk incident. And as I look back to see if there wasn't something, with hindsight, that should have given me a clue, even with hindsight, I had no suspicion whatsoever.

And I might add that Mr. Seissler had interviewed a lot of Commission staff and some of the Commissioners and I don't think anyone else suspected anything either. It's an unfortunate incident and certainly one that I wish had not occurred.

Senator **Leahy**. Except that the other four Commissioners within hours of getting that report came zipping right back, asking, "What about this guy?"

Ms. **Liebeler**. Well, that was not surprising. They wanted to ask about the report and wanted to see his credentials, I don't think any of them ever suggested that this fellow did not have the credentials that he had represented.

I was not surprised that the Commissioners would want to know about the background of the consultants. They were not comfortable with some of the recommendations in the report.

Senator **Leahy**. Why didn't the Justice Department prosecute, do you know? I'm just curious.

Ms. **Liebeler**. Senator, I don't have access to their files.

Senator **Leahy**. They didn't tell you?

Ms. **Liebeler**. My understanding is that the standard reason given for not prosecuting is lack of prosecutorial merit.

Senator **Leahy**. As you said, some of your fellow Commissioners might not have liked some of the report. Some would say that you had an agenda of management changes you wanted to accomplish at the ITC and you viewed the MDS study as a means to those ends. Consequently, you neglected to consider adequately whether those means were appropriate.

How would you respond to that? I'm trying to be fair in recounting some of the statements that have been made to the committee about that, but I also want to give you the chance to respond. Answer any way you care to and at any length you care to.

Ms. **Liebeler**. I appreciate the opportunity, Senator. I did not have a management agenda at the ITC when I became Chairman, but I will share with you, Senator, my concern with various aspects of Commission management.

Maybe it's because of my legal background and the fact that I was used to working with accountants that I was very concerned about the lack of an audit program and the fact that this issue had been called to the Commission's attention for years and nothing had been done.

I was also very concerned about some weaknesses that I had identified in the Office of Contracting and Procurement, and the lack of what I considered sufficient oversight over these weaknesses. Nothing was being done about them. I was very concerned about that.

In talking to some of my colleagues about the weaknesses I perceived, they seemed to think that the way to handle these types of questions was to ask the senior staff whether everything is all right, and if the staff says everything is all right, then to let it go and do nothing.

Because of my own background, I believe that when you have questions about operations in Contracting and Procurement, management services and ADP, you ask an auditor to take a look and see if things are running right. I have to tell you, Senator, I definitely had an audit on my agenda. I've always been very forthcoming about that.

As for some of the other changes, even on the audit, my own preference was for an inspector general, an in-house audit program. The MDS report came back recommending outside auditing services. I had also asked for a recommendation from the Director of the Office of Finance and Budget, and his recommendation was against an inside inspector general and in favor of outside auditors.

I was not convinced that using outside auditors was inappropriate and I was willing to proceed on that basis. I understand that Congress may mandate inspector generals for agencies our size, and that is probably not a bad idea.

As for the recommendation on quality assurance standards as a Commissioner I have always been concerned about the analytical framework on which our studies are based, the effectiveness of our questionnaires, and our data-gathering procedures. I'm on record many times in a number of studies asking questions about such matters.

So while I'm not sure that I view the need for quality assurance standards for economic studies as an agenda item, it would not be surprising coming from me. I've gone on record several times suggesting that the Commission needs to approach our studies differently than we do now.

Also, the verification of data has been something that I have felt the Commission should be doing.

As for the executive director recommendation: as presently structured, the ITC has a weak Chairman, a Chairman that sits for 2 years who can be overridden on any administrative matter by a majority of the Commissioners.

The ITC has a Director of Administration and a Director of Operations and it lacks an executive director. I really think that is the wrong way to run an agency. I will only be Chairman, until either I'm confirmed, or until my term as Chairman runs out in June of 1988 so this recommendation will not affect my tenure.

But given the weak chairmanship, either a strong executive director should be in place or the chairmanship should be strengthened. I don't think bifurcated management is a good way to run an agency. I don't think it provides effective management.

So, yes, I had thought about this matter, and about various ways that the problem could be solved.

Senator LEAHY. Thank you. I'm sorry.

Ms. LIEBELER. No, that's all right.

Senator LEAHY. I don't want to cut you off at all. If you have more to say, go ahead.

Ms. LIEBELER. I would mention, Senator, that there have been two independent studies of the Commission—one by GAO and one by a procurement expert from another Federal agency—both studies have identified several problems in the Commission's management and operations.

Senator LEAHY, Let me ask you one last question about the MDS study. On October 1, 1986, you sent a memo to your two predecessors as Chairman of the ITC, Paula Stern and Alfred Eckes. I will insert that memo in the record at this point.

[Memorandum follows:]

CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

MEMORANDUM

TO: Commissioner Stern

FROM: Chairman Liebeler Susan Liebeler

DATE: October 1, 1986

RE: MDS

The MDS Consultants, Inc. study of July 30, 1986, states on page nine, "Since the Commission has no regular audit program, has not complied with OMB A-127 requirements, the provisions of A-123, we question the completeness of the Chairman's annual FMFIA certification to the President and the Congress.

The MDS report does not substantiate this statement and provides no basis for such an assertion. I have no reason to question the good faith and integrity of you or Commissioner Eckes in your roles as Chairman in providing certifications under the Federal Managers Financial Integrity Act.

Please feel free to share this memorandum with such persons as you believe appropriate.

SL:ma

cc: Commissioner Eckes

Senator **Leahy**. You point out that the MDS study questions the completeness of the Chairman's annual Federal Managers Financial Integrity Act certification to the President and the Congress, and then you go on to say the MDS report does not—my emphasis—does not substantiate this statement and provides no basis for such an assertion. "I have no reason to question the good faith and integrity of you or Commissioner Eckes in your roles as Chairman in providing these certifications."

Now, obviously, on October 1 when you sent that letter, you realized the report provided no basis for impunging the integrity of your predecessors, but you had differences with them over matters of trade policy and application of the trade laws, which is fine; people will differ on those things.

But you recognized at least in that memo, as I read it, that you understood they did their best to direct the Commission in compliance with the law. This was October 1. But on August 1, two months before, you took that very same report, the very same report which you said two months later "does not substantiate the statement and provides no basis for such an assertion," and so on—2 months earlier, you took the same report up on Capitol Hill with a letter that told your oversight committees that the report found that the Commission generally does not operate in accordance with the Financial Integrity Act.

Why did you recognize on October 1 that it doesn't say that, but on August 1 you felt it did?

Ms. **Liebeler**. The October 1, 1986, memorandum was given to Commissioner Stern and Commissioner Eckes in response to Commissioner Stern's perception that somehow her integrity had been called into question by the MDS report.

I did not ever feel that the integrity of Commissioner Eckes or Commissioner Stern had been called into question by the MDS report. And given the depth of Commissioner Stern's feelings on this issue, I acceded to her request to provide this memorandum to her, but I see nothing in the MDS report that would question the good faith or the integrity of any Chairman of the ITC.

Senator **Leahy**. It has been reported to us on another matter that at a senior staff meeting you convened in late March or early April the subject of your nomination to the Federal court came up.

It has also been reported to us that you said to the assembled senior managers of the ITC words to this effect: "Remember what happened to Brad Reynolds. If my nomination——" [Laughter.]

Let me finish because it's important.

Ms. **Liebeler**. I'm sorry.

Senator **Leahy**. "If my nomination is not confirmed, I'll make what Brad Reynolds did at Justice look like kindergarten." Did you make any remark—— [Laughter.]

Ms. **Liebeler**. Senator——

Senator **Leahy**. This is a serious question and——

Ms. **Liebeler**. I'm sorry I laughed.

Senator **Leahy**. No, no. I was talking to the audience, but go ahead.

Ms. **Liebeler**. Senator, I'm sorry if I laughed, and I'm sure it's a serious question and I apologize to the Senator for laughing.

Senator **Leahy**. Oh, no, there is no apology to me.

Ms. **LIEBELER**. The first part of the statement was a joke. The second part of what you said, I've never heard before. I did not say that.

Senator **LEAHY**. What did you say?

Ms. **LIEBELER**. Oh, Senator, I don't remember my exact words. Our senior staff meetings are not formal, serious events, and sometimes they are conducted in a rather light-hearted informal manner. I think that it came up in the context of our move. The ITC is moving to a new building and I have spent an enormous amount of my time this last year on relocation issues, as have too many people at the ITC.

And somebody cracked a joke or said, well, now with your nomination, you're not even going to have to worry about getting to the new building. And then somebody else said, oh, that can take some period of time, or something like that.

And I said, well, things like this take time and it may take a while. And somebody said you might not get confirmed, and I said, yes, remember Brad Reynolds, or something like that, as a joke.

Senator **LEAHY**. What does that mean?

Ms. **LIEBELER**. Brad Reynolds never got confirmed. There are people who don't get confirmed. It was certainly not a threat to the ITC staff. And the second part of that comment that I thought I heard you say, something about kindergarten, I did not say.

Senator **LEAHY**. Okay. Did everybody there think it was funny?

Ms. **LIEBELER**. Well, Senator, there must have been one person there who didn't think it was funny or you wouldn't have that story.

Senator **LEAHY**. Good answer.

Ms. **LIEBELER**. I regret that someone didn't think it was funny, but not everyone thinks my jokes are funny.

Senator **LEAHY**. Many of us have that same problem, but a man who I always consider very serious when he wants to be serious and very funny when he wants to be funny, whose jokes I always laugh at if he wants me to, is Senator Thurmond, and I'll yield to him because he wants to ask a question.

Senator **THURMOND**. Thank you.

Ms. Liebeler, you've been on the witness stand now for 2 hours and 40 minutes and I know you're a little weary, and I'm 45 minutes late for another appointment. So I'm just going to take a few minutes and ask you a few questions. You can answer them very briefly.

About your tenure at the International Trade Commission, would you please tell the committee what you consider to be your major accomplishments at the ITC?

Ms. **LIEBELER**. Thank you, Senator.

Senator **THURMOND**. You don't have to go into a lot of detail. [Laughter.]

Ms. **LIEBELER**. I'll make it real quick, Senator.

Senator **LEAHY**. We don't want to cut this witness off at all, Strom.

Ms. **LIEBELER**. Senator, one of the things that I think I've been instrumental in at the agency is moving it toward——

Senator **THURMOND**. Speak a little louder so we can hear you.

Ms. **LIEBELER**. Of course.

I've worked very hard to get computers and automation for the staff, including lap-top computers and personal computers, and I've made that a priority of my administration.

In addition, I have worked very hard to improve the training available for our professional staff. I have worked with the Directors of Administration and Operations to set up economics, accounting, and statistics courses to give our staff the opportunity to improve their training.

I have also worked very hard on the relocation. Our staff suffers terribly from the problems associated with an old building and the staff receives poor services from the management services staff. I have worked very hard on the relocation to get a better environment for our staff, as well as the Commissioners.

I have also worked very hard to improve the procurement office because our program offices have had a very difficult time getting adequate services from the Contracting and Procurement Office and getting the materials and software that they need. I have worked very hard to improve both the training of the procurement staff and their relationship with the rest of the Commission staff.

Senator THURMOND. Ms. Liebeler, you were on the ITC for more than 2 years before you became Chairman. As the Vice Chairman and as a commissioner, were you consulted on management matters by the prior two chairmen, and have you worked with the other commissioners on the ITC in trying to resolve the management concerns you have expressed to them?

Ms. LIEBELER. Before I became Chairman, I was Vice Chairman under Chairwoman Stern. I was generally not consulted on management matters. I was consulted, as were other Commissioners, on budget matters to get my vote because the statute requires the approval of a majority of Commissioners to get the Commission budget through. But other than that, I was not generally consulted on management matters by either of the prior two chairmen.

I have tried by informal discussion, written memoranda, and public meetings to discuss my management concerns with my fellow Commissioners. During my tenure as Chairman, these concerns were and are significant. I have generally not been successful in convincing my fellow Commissioners that these are serious matters that need attention.

Senator THURMOND. Ms. Liebeler, I consider judicial temperament to be an essential prerequisite for a Federal judge. In fact, it's one of the three essentials the American Bar considers—integrity, judicial temperament, and professional qualifications.

Would you give us your thoughts on this subject? I've seen Federal judges embarrass lawyers, embarrass witnesses and jurors. They've got all the power in the world they need, but it seems they have to flaunt that power when it's unnecessary.

I'd like to get your views on that.

Ms. LIEBELER. I certainly agree, Senator, that temperament is a very important quality in a Federal judge, and also in a commissioner. I think it is very important that the public, the litigants, and the lawyers who appear before a judge or a commission have the perception, and the reality should be, that they get fair and open-minded treatment by the adjudicative officials. I also think it is important that judges be fair and even-tempered in the way they conduct their proceedings.

Senator THURMOND. Now, Ms. Liebeler, you have heard the concerns raised regarding your contracting with MDS Consultants. Are you aware of any actions on your part that might be considered improper or unethical in your dealings with MDS or its principals?

Ms. LIEBELER. No, I am not.

Senator THURMOND. Ms. Liebeler, in discussing the need to award the MDS contract, did you at any time request the ITC administrative personnel responsible for awarding the contract to bypass, avoid or ignore any rules, regulations, or procurement laws?

Ms. LIEBELER. No, I did not.

Senator THURMOND. Ms. Liebeler, there has been some criticism of your analysis of the facts in cases which come before the ITC, as well as your voting record there. Would you comment on these criticisms briefly?

Ms. LIEBELER. Senator, I'll be very brief. I take my oath of office very seriously, and I think that my role as an independent factfinder requires me to look each case on the facts, apply the law, and call these cases as I see them, and I do that.

Senator THURMOND. Ms. Liebeler, were there any issues which were raised so far today that you feel require further elaboration and explanation? In other words, is there anything you want to tell us that you haven't told us that you feel you should tell us?

Ms. LIEBELER. I don't think so, Senator. Thank you.

Senator THURMOND. Now, Mr. Chairman, I've got a long list here of support letters in behalf of Ms. Liebeler, and rather than take the time I'll just ask that they be placed in the record.

Senator LEAHY. Of course.

[See appendix.]

Senator THURMOND. Mr. Chairman, thank you very much. Ms. Liebeler, I want to thank you for your appearance here and I feel you are a very competent lady and that you'll make an excellent judge. I'll be glad to support you.

Mr. Chairman, if you will excuse me.

Senator LEAHY. Certainly, if there are any further questions, Senator Thurmond, that you or any other member has, the record will stay open for that.

Just to follow up a little bit on it one of Senator Thurmond's questions. You have served in a quasi-judicial position and have been nominated for a judicial position. Would you agree that a judge has to be able to set aside her own personal views and apply the law as she finds it, impartially and fairly?

Ms. LIEBELER. Yes, I would.

Senator LEAHY. And can you assure the committee that if you are confirmed, you will set your own strongly-held personal beliefs aside and apply the law as it is written and as it's been interpreted by binding precedents?

Ms. LIEBELER. Yes, Senator.

Senator LEAHY. I appreciate the answer. It's similar to the answer you gave to the Finance Committee in your confirmation hearing for the ITC. I mention it only because there will be—and others may have—questions about how you have applied the law in your quasi-judicial position on the ITC.

Let me ask you another question. You have been most patient in sitting here and answering these. I'm sure you can think of other ways to spend an afternoon.

I have the unenviable position of being told by the other members of the committee that they are all very busy, so I have the privilege to ask all these questions of the nominees. My colleagues looked around at who showed up 5 minutes late at the organizational meeting of the committee, so I've got the chore. I was the one 5 minutes late.

A question has been raised about a report in the Bangor, Maine News in April 1985, and it began as follows: " 'I don't understand. Why don't you move somewhere else to get a job,' asked Susan Liebeler, one of five members of the International Trade Commission currently reviewing the problems of the U.S. shoe industry. 'That's what I did,' continued the Commissioner, during the ITC's second day of hearings. Liebeler, reportedly a close friend of the Reagans, is managing a two-coast marriage since last April when she accepted her current $70,000 per year White House appointment to the Commission."

Did you make a remark like that at a public hearing on the problems of the U.S. shoe industry?

Ms. **Liebeler**. Senator, on April 16, 1985, two unemployed shoe workers testified before the Commission in the non-rubber footwear case, and I did not question either of those witnesses.

On the following day, an economist testified extensively before the Commission and presented his analytical framework and his conclusions about the effect that a quota would have on society, i.e. the welfare implications of a quota. The economist said that as a result of a quota being placed on non-rubber footwear, a benefit would be created and society would be better off by the amount of additional salary paid to newly-employed footwear workers.

Let us say one hundred people go back to work and they each get a salary of $20,000 per year. The economist testifying on behalf of the petitioners would multiply the one hundred times the salary of $20,000 and say society is that much better off. I questioned his assumptions.

Commissioners question expert witnesses quite frequently, and I questioned his assumptions. I believe, I questioned his assumptions, if you would like to check the transcript, the colloquy is set forth at page 329 of the transcript of those hearings.

Senator **Leahy**. That's why I'm asking you. All I have is the article.

Ms. **Liebeler**. Yes.

Senator **Leahy**. You're saying you did not make those statements quoted here?

Ms. **Liebeler**. I didn't make that statement, but just so the record is clear, Senator, what I did say to the economist was that I worked as a law professor on the West Coast for, let's say, $50,000 and I liked living in Los Angeles.

When I came here to Washington and was paid $69,000, there was not a $19,000 welfare gain. My point was that that was an improper way to measure welfare gains; that the economist had to take the opportunity cost of the workers into account. It was really a technical discussion, and what you just read takes that completely out of context.

Senator LEAHY. So the article takes it out of context?

Ms. LIEBELER. Certainly.

Senator LEAHY. You did not suggest to a shoe worker or anybody else, why don't you just move to a different job?

Ms. LIEBELER. Certainly not. In fact, I recommended adjustment assistance in that case.

Senator LEAHY. Because there really would be no relationship between the shoe worker's job and your job at Loyola where you had tenure?

Ms. LIEBELER. I was not even comparing the two. I was talking to the economist and questioning his assumptions that the creation of a new job created a net welfare gain. I think that assumption is incorrect.

Senator LEAHY. And in no way did you compare the two, the Loyola job and the shoe worker's job?

Ms. LIEBELER. Oh, certainly not.

Senator LEAHY. Thank you.

There will be other questions for the record. If we are going to have a continuation of this, I would want to have Senator Thurmond or whomever he would designate here, and we will pick a time that will be convenient for Senator Thurmond or others. We have gone considerably longer than I think we told Senator Thurmond originally we were going to.

So we'll stand in recess now and the record will stay open, and I thank the witness very much for her patience and understanding.

[Whereupon, at 4:55 p.m., the committee was adjourned.]

NOMINATION OF SUSAN W. LIEBELER

TUESDAY, NOVEMBER 3, 1987

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:19 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy presiding.

Also present: Senators Thurmond and Grassley.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator **Leahy**. This morning, we will have the continuation of the hearing on the nomination of Susan Liebeler to be a judge for the U.S. Court of Appeals for the Federal Circuit. This will be the 14th hearing in this Congress to consider nominations to the lower Federal courts.

A hearing on this particular nomination was held on August 6th. At that time, the nominee was questioned about several factual matters arising from the committee's investigation into the question of judicial temperament.

This morning's hearing will primarily address another aspect of the nominee's record—her interpretation of the trade laws as a member of the International Trade Commission. After further examination of this nominee, we will hear the testimony of representatives of three bar associations which have looked into Ms. Liebeler's qualifications for the post to which she has been nominated.

We always, of course, welcome comments on judicial nominees from those who practice in the courts. Their perspectives are particularly valuable when the nomination involves specialized issues such as the trade law jurisdiction of both the ITC and the Court of Appeals for the Federal Circuit.

Before we turn to the nominee, let me note for the record that the committee has received numerous communications both in support of and in opposition to the nominee. Although it is not possible to take the testimony of all these witnesses at this hearing, their statements will be incorporated in the record and they will be given to the members of the Judiciary Committee.

[See appendix.]

Senator **Leahy**. We will also keep the record open for a limited time for follow-up questions of the nominee and for additional questions that may be submitted by members of the committee who are unable to be present this morning.

I should note in that regard that Senator Thurmond has been detained at a meeting at the White House, but has said that he has no objection to us going on with the hearing without him.

I mention this only because nobody has been a more faithful participant at these hearings than Senator Thurmond, who has been present more than any other Senator. Certainly, the record will be kept open until we have time to ascertain from Senator Thurmond whether he has any questions of any of the witnesses today.

The record will be kept open for all Senators. The record will not be closed until we determine that Senator Thurmond has had an opportunity to submit what he wants.

Ms. Liebeler, could you please come back to the stand? You are, of course, under oath from your previous testimony. Just make sure you bring the microphone close.

This is sort of a continuation of some of the things we touched on before. In your role as a member of the International Trade Commission, some of your interpretations of the trade laws have proven to be controversial. I thought you would be the best source to talk about some of the criticisms that have been raised about your performance.

Would you agree with me that your primary responsibility as a member of the ITC has been to ascertain the meanings of the trade laws passed by Congress and then to apply those laws to the facts of the cases before you?

TESTIMONY OF SUSAN WITTENBERG LIEBELER, MALIBU, CA, TO BE JUDGE FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Ms. LIEBELER. Certainly, Senator.

Senator LEAHY. Would you also agree that the primary responsibility of a Federal judge in a case involving a Federal statute is very similar to that of an ITC Commissioner—to ascertain the meaning of the statute and to apply the statute to the facts of the case before the court?

Ms. LIEBELER. Yes, Senator, when serving as a trial judge.

Senator LEAHY. Now, you have been nominated for the Court of Appeals for the Federal Circuit, which is unique among the Federal courts. Its jurisdiction is almost exclusively questions arising under the Federal law, such as government personnel law, Federal tax law, patent law.

Relatively few of the cases, as I understand it—I have never practiced before this court—are decided on the basis of either State law or common law. Similarly, cases before the ITC are decided exclusively on the basis of Federal law. Is that a fair comparison?

Ms. LIEBELER. Sure, Senator.

Senator LEAHY. Now, my understanding from reviewing the record of your confirmation proceedings in the Finance Committee is that, before you went on the ITC, you had had relatively little direct experience with the trade laws. Is that correct?

Ms. LIEBELER. Yes.

Senator LEAHY. In fact, I think Senator Heinz and others had asked you about that at the time, and I assume that you felt as a lawyer, and as an experienced lawyer, one with a good background in the law, that you could learn the matter quickly if you were confirmed. Apparently, the Finance Committee felt that way and I assume you did, too. Is that correct?

Ms. **Liebeler**. That is correct, Senator.

Senator **Leahy**. How did you go about learning the trade laws, just for my own curiosity? How did you do that? You went into an area which had not been your main expertise. You went to the ITC. Obviously, you had to develop expertise in a particular, specific area. What did you do?

Ms. **Liebeler**. That seems like such a long time ago. It has only been 3 years, but I would be glad to share with you how I approached my responsibilities as a Commissioner. Of course, the first place I started, being trained as a lawyer, were the statutes which gave jurisdiction to the Commission.

The Commission has statutory responsibilities under a relatively few number of statutes relating to trade, and I looked at them very carefully. I read relevant portions of the legislative histories, and at that time I read extensively Commission opinions as well as the reviewing courts' opinions which had come down on various issues that had come up from the Commission.

On any particular case when I am sitting as a Commissioner, I have the advantage of having a record, briefs from the parties, and my own staff as well as the professional staff of the Commission available to assist me.

As I participated in more and more cases I moved up the learning curve and I became more proficient at addressing the issues.

Senator **Leahy**. Well, if you get a particular set of facts, for example, you have got to apply the law. How do you go about determining what the Congress meant when it enacted a particular provision of the law?

Ms. **Liebeler**. Well, the first place I would start, Senator, is the statute. Sometimes the statute is very clear and sometimes the statute is ambiguous, or perhaps instead gives a large amount of discretion to the Commission.

In fact, the statutes that the Commission administers have given to the Commission a great deal of discretion as triers of fact in weighing and in evaluating a series of factors in deciding whether domestic industries are injured or threatened with injury by reason of imports.

Senator **Leahy**. But in some of the areas of discretion, Congress is very specific giving that discretion. In other areas, it would appear that the statutes may have been passed as a result of a great deal of compromise within the legislative process, which may end up giving you more discretion than you might have liked. What do you do in a case like that? Do you go back and read the history? Do you ever look at the debates and the legislative history of a particular statute?

Ms. **Liebeler**. It depends on the particular case and the issue involved in the particular case, but frequently I do, Senator. It depends on what is in front of me. I can——

Senator **Leahy**. But you have had instances where you have gone back and read the legislative history?

Ms. **Liebeler**. Oh, certainly.

Senator **Leahy**. The committee has heard from a number of sources, and I will go into this criticism, about specific interpretations you have given to the trade laws, particularly in the area of dumping or countervailing duty cases. I want to ask you about some of these criticisms.

I do not mean to suggest that the committee agrees or disagrees with the criticisms, but they have been raised, and they have been raised by responsible parties, so let us go down through some of them.

One is the five-factor test. (Now, for those who are visiting this committee who have watched television and expect spectacular debates on matters that everybody understands, they are sitting here with their eyes quickly glazing over, except for those specialists who do understand the five-factor test and your use of it to determine whether product dumping is a cause of material injury to U.S. industry.)

You first articulated the five-factor test in the well known case of *Red Raspberries from Canada,* but you applied it in several subsequent cases as well. What is your reason for applying the five-factor test?

Ms. **Liebeler**. I apply the five-factor test, Senator, to assess the effect that the dumped or subsidized goods have had on the domestic market. I use it after I have defined the domestic industry and the like product, and after I have evaluated a whole series of factors in the statute to see if the domestic industry has been materially injured or threatened with material injury.

I reach all those questions first and then only in cases where I found injury, or a majority has found injury, do I proceed to the causation analysis, and in the causation analysis I use a five-factor approach.

Senator **Leahy**. Does that determine predatory pricing?

Ms. **Liebeler**. I do not look for evidence of predatory intent, Senator, and in no case which I have seen at the Commission—and I have voted affirmatively in many cases—have I ever seen evidence or looked for evidence of predatory intent, or has predatory behavior been present.

Senator **Leahy**. Do you think that predatory pricing is a necessary element of a dumping law violation?

Ms. **Liebeler**. No, I do not, Senator.

Senator **Leahy**. What about in the *Red Raspberries* case? You said that dumping was illegal only where "a firm lowers the price of a product below the marginal cost of production." Is that not another way of saying that only predatory dumping is prohibited?

Ms. **Liebeler**. I did speak by analogy to predatory pricing, but, Senator, I do not require predatory pricing or predation to reach an affirmative result. In fact, there was no evidence of predation at all in *Red Raspberries.*

Senator **Leahy**. No evidence of what?

Ms. **Liebeler**. Predation, predatory behavior.

Senator **Leahy**. Is that a word, "predation?" I mean, is this a term of art?

Ms. **Liebeler**. Well, Senator, maybe it is not, but I used it in some opinions and the spelling checker has not kicked it out.

Senator **Leahy**. Okay. So you do not feel that the *Red Raspberries* analysis is one that is based on predatory dumping? I am trying to understand what you are saying.

Ms. **Liebeler**. I have never required predatory intent or predation. I have talked about what happens when people lower prices, but I have never required predatory intent. The statute would preclude me from doing so.

Senator **Leahy**. But you use the five factors.

Ms. **Liebeler**. I do use the five factors, Senator, and I think the five factors, Senator, are in the statute. I can relate them to the statute if you think that would be helpful.

Senator **Leahy**. Well, yes. Let me ask you about that because you have written that they are proxies for the inquiry that Congress has directed the Commission to undertake. I assume you do not find them in the statute.

Ms. **Liebeler**. Senator, that is not what I meant by proxies, if I can respond to your question.

Senator **Leahy**. Well, tell me what you meant?

Ms. **Liebeler**. I used the word "proxy" as an economic term of art, as an economic signal or an indicator. For example, you cannot see causation with the naked eye and what you would look for is a signal or an indicator of causation, and those are my indicators of causation.

I did not use proxy in the way that I think you are interpreting it, as a substitute. At the time I used it it never occurred to me that someone would interpret the word proxy that way.

Senator **Leahy**. But you do not find the five factors enumerated in the statute?

Ms. **Liebeler**. Senator, I can, in fact, directly relate them to the statute, if you will permit me.

Senator **Leahy**. Would you, please?

Ms. **Liebeler**. Sure. The first factor I look at is market share held by imports, and 19 U.S. Code 1677(7)(B)(i) instructs the Commission to consider the volume of the imports of the merchandise which are the subject of the investigation in making their material injury determination. And it goes on further to explain that the Commission should evaluate the volume to see whether it is significant, and to me that means market share.

The second factor that I look at is the size of the margin of dumping determined by the Department of Commerce. The ITC does not have any authority to determine that margin. That is done by the Department of Commerce. In 19 U.S.C. Section 1677 (7)(B) and (C)(iii) the Commission is instructed to consider other relevant economic factors. I believe that the dumping margin provided by the Dept. of Commerce is one of the other relevant factors.

I would point out, Senator, that this issue has been argued before the Court of International Trade. In a recent decision in the *Hyundai* case the Court of International Trade affirmed the discretion of Commissioners to consider the margin of dumping.

The third factor that I look at is product homogeneity.

Senator **Leahy**. Is which? The third factor——

Ms. **Liebeler**. Whether the products are homogeneous or not. I mispronounced the word the first time. That is why you did not hear it right; whether the products are homogeneous.

The statute clearly instructs the Commission to consider whether the volume of imports is significant, and the degree to which the imported product can be substituted for the domestic products helps one to understand how significant the imports are.

I would also point out that product homogeneity is another relevant economic factor which the Commission has been given discretion to consider. Although it is not specifically enumerated, I believe it to be a relevant economic factor.

The fourth factor I look at is prices. I generally look at aggregate price data over time to see if prices have been declining. And, clearly, 1677(7)(B)(ii) states that the Commission in making its material injury determinations shall consider the effect of imports of that merchandise on prices in the United States for like products.

The last factor that I consider is the responsiveness of other foreign suppliers, or alternatively, barriers to entry into the United States. I believe it is a relevant economic factor which the statute gives me discretion to consider.

Senator **LEAHY**. Well, I still have some problems, and maybe it is a bit of a hang-up on the word "proxy." You said Congress said to consider the volume of imports, and you consider market share a proxy for this volume standard. But if Congress wanted you to consider market share, would they not just say "consider market share?"

Ms. **LIEBELER**. Senator, just to be clear, I do not use market share as a proxy for volume. I look at Congress' instruction to consider the significance of any particular volume of imports.

Obviously, a hundred units might sound like a small amount of imports, but if the total consumption in the United States were 200, that would be a 50-percent market share and it would be quite significant.

Senator **LEAHY**. But would that not be up to Congress to say that? Would it not be up to Congress to say market share? I mean, volume of imports and market share could conceivably mean entirely different things, could they not?

Ms. **LIEBELER**. Senator, I do consider the volume, but I consider it with respect to the market, and I think that the legislative history makes clear that Congress expect market share to be considered. I can take a minute and also find it in the statute which instructs the Commission to look at the relative market share.

Senator **LEAHY**. Why do you not submit that one?

Ms. **LIEBELER**. I sure will, Senator.

[See submissions of November 12 in appendix.]

Senator **LEAHY**. Let me tell you the reason I raise that and the reason we would like your reactions to it. There is a law review article in "Law and Policy in International Business" written by a trade attorney named Paul Jameson. He was writing about the five-factor test and he said "not one of these five criteria is within the letter or the spirit of the law." That is a pretty strong statement to say that not a single one of them apparently gets in the legislative ball park. How do you respond to that?

Ms. **LIEBELER**. The statement is incorrect, Senator.

Senator **LEAHY**. Have you seen the article?

Ms. **LIEBELER**. I have seen the article and I believe the statement is incorrect.

Senator **LEAHY**. Have you made any response to it?

Ms. **Liebeler**. Senator, I thought that——

Senator **Leahy**. I am not suggesting you should have. I just want to know because if you have, we would put that in the record. But have you made any kind of a response?

Ms. **Liebeler**. No, Senator. I thought it would be unseemly to do so.

Senator **Leahy**. Have you prepared for your own use any kind of memorandum critiquing the Jameson article?

Ms. **Liebeler**. I do not have a formal memorandum, Senator, but I do have my own talking points on it just in case you brought it up, which I am looking at right now. I should also mention that I have copies of some letters that I understand have been written to the editor of the journal about the article, pointing out some flaws in scholarship, and I would be happy to submit them for the record.

Senator **Leahy**. Are there any of those letters or any part of those that you would like as part of the record in these hearings?

Ms. **Liebeler**. Certainly, Senator. I will submit for the record letters from Professors John McDermott and an attorney named Nolan Clark, copies of which were sent to me by the authors of those letters.

Senator **Leahy**. We will make sure that that is part of the record. I am sure Senator Thurmond would want them to be part of the record, too.

[See appendix.]

Senator **Leahy**. In that article, Mr. Jameson attacked your conclusion that intentional predatory pricing is an essential factor to be proved in an anti-dumping case. He goes back to the floor debate of the 1921 anti-dumping act and the statements in the 1957 report by a House Ways and Means subcommittee that he says clearly state that persistent or sporadic dumping, even if not predatory, is covered by the act. Are you familiar with that criticism?

Ms. **Liebeler**. Senator, I am familiar with the criticism. While I brought talking points, I did not bring a copy of the article. I would appreciate it if your staff could give me a copy of the article. If you would like to talk more about it, I would feel more comfortable responding with a copy in front of me.

What page, Senator, please?

Senator **Leahy**. Now, you have my copy of the article.

Ms. **Liebeler**. Oh, I am sorry.

Senator **Leahy**. That is okay.

Ms. **Liebeler**. We can share. I could send it back.

Senator **Leahy**. Is he wrong in saying that you feel that intentional predatory pricing is an essential factor to be proved in an anti-dumping case?

Ms. **Liebeler**. Yes, he is wrong, Senator. I do not require predatory intent or predatory behavior.

Senator **Leahy**. Okay, that is what it goes to.

In his article, he cited your decision in the *Agricultural Tillage Tools* case and he asserted that you applied the same five-factor test to cases involving subsidized imports, countervailing duty cases, as well as the dumping cases. Is that correct? Do you?

Ms. LIEBELER. I do apply the analytical framework in both types of cases. I think it is very useful for determining causation in dumping and subsidy cases.

Senator LEAHY. Do you think Congress meant to prohibit subsidized imports only if predatory pricing is involved?

Ms. LIEBELER. Certainly not, Senator.

Senator LEAHY. If you have anything you want to submit to the record regarding the Jameson article, please feel free. You are not required to, but should you want to, the record will be open for that.

Ms. LIEBELER. I will, Senator, but may I respond orally, please?

Senator LEAHY. Sure.

Ms. LIEBELER. One of the most significant problems with the article is that it fails to disclose the author's stake and bias. The author represents petitioners in many cases before the Commission and he was counsel of record in many of the cases that he cites and in one case which he lost in the Court of International Trade. Nowhere in the article is that bias or stake disclosed.

Senator LEAHY. Did he win the others?

Ms. LIEBELER. Pardon?

Senator LEAHY. You said he lost one of these cases. What about the others?

Ms. LIEBELER. The argument I am referring to in the article which I am responding to——

Senator LEAHY. Was the one he lost?

Ms. LIEBELER. He was a counsel of record in the *Hyundai* case, and the article goes on from 562 to 573 criticizing the consideration by some Commissioners, of which I am one, of the size of the dumping margin in anti-dumping cases, and the author argues that the statute precludes its consideration.

It is only in a footnote on page 570 that he concedes that the Court of International Trade has held that Commissioners have discretion to consider that margin. He was a counsel of record in that case and he obviously made that argument in the court and it was rejected by the court; a fact he does not disclose.

Senator LEAHY. And you are perfectly welcome to make that kind of a criticism of it. But I would also like for the record your response to the basic thrust of his article. It still raises significant legal issues and that is what I would like you to respond to. If you wish to go to his batting average before the Commission or cases he has had there, that is fine, but also go to the specifics.

Ms. LIEBELER. I would be glad to, Senator.

Senator LEAHY. Thank you.

[See appendix.]

Senator LEAHY. Now, one of your fellow Commissioners, Commissioner Eckes, has written the following about the five-factor proxy test. Let me read it from the *Ethyl Alcohol* case. He said, and I quote, "I reject the notion that one may apply a proxy or substitute for an unambiguous statute that spells out specific criteria such as the volume of imports, evidence of price undercutting, price depression or suppression, and other factors that Congress has expressly instructed the Commission to consider. Nor is it likely that Congress intended for Commissioners to stray far from the specific statutory criteria and to rely in the absence of compelling circumstances on the phrase 'all relevant factors' as an invitation to substitute abstract economic models for specific criteria designated in the statute."

I guess what he is saying is that if Congress had intended to reach only predatory dumping or if they wanted the Commission to apply the five-factor test, they would have said so. How do you respond?

Ms. LIEBELER. Senator, I do not use predatory pricing or predatory intent as a requirement for finding material injury or threat of material injury by reason of dumped or subsidized goods.

Also, Senator, as I mentioned earlier, I do not use anything instead of the statutory criteria. There are 17 factors in the statute. I look at all of them very, very carefully. I consider all of them.

If it would be helpful to you, Senator, I would point out that the statute requires the Commission to look at 17 factors. Fifteen pertain to the domestic industry: They are prices, output, sales, profits, productivity, return on investment, market share, capacity utilization, capacity itself, cash flow, inventories, employment, wages, growth, the ability to attract capital and investment.

Those statutory factors are addressed in my decisions in a section called condition of the industry and injury to the industry. I generally concur with my colleagues in finding injury or threat of material injury. I am frequently in agreement with them on this issue.

The other two factors the statute instructs the Commission to look at are import volume and prices, and I do that as well. The statute also instructs the Commission to consider any other relevant economic factors.

What the statute does not do is tell you exactly how to evaluate them. Two factors—import volume and domestic prices are two of the factors which play a very important role in my causation analysis. Other commissioners also focus on these factors when addressing causation.

I do indeed consider all the statutory factors. I do not abandon them as the excerpt that you have just read would suggest.

Senator LEAHY. Well, what he is saying, of course, is the phrase "all relevant factors" does not permit the Commission to use his words, "to stray far from the specific statutory criteria * * * in the absence of compelling circumstances."

The five-factor test—is that there because of "compelling circumstances?"

Ms. LIEBELER. Senator, several of the factors come right out of the statute and others——

Senator LEAHY. Not all of them.

Ms. LIEBELER. And others, I think, are relevant economic factors that I consider to be quite relevant. Causation is a very, very difficult issue for the Commission to address. You cannot see causation with the naked eye.

Different commissioners have developed different frameworks for approaching it. Some do it on a rather intuitive basis, while I have provided a fairly consistent, formal framework that I use in addressing causation.

Senator LEAHY. But you said earlier this morning, if I understood you, that three of your five factors came from "other relevant factors," not directly out of the statute. Am I correct in that or did I misunderstand your testimony?

Ms. **Liebeler**. Market share and prices are right in the statute. The dumping margin I think is an "other relevant economic factor." Congress gave me the discretion to consider other relevant factors.

The homogeneous product factor, Senator, helps me evaluate, as the statute instructs me, whether any volume of imports is significant because it tells me how substitutable the foreign product is for the domestic one, whether it is a higher-priced or a lower-priced product.

The degree of product substitutability tells me when and whether purchasers will begin to substitute the imported good for the domestic good. Product homogeneity tells me how significant the import volume was, so I think this factor is derived right from the statute as well.

Barriers to entry is something that is not specifically enumerated in the statute. I would call your attention again to the statutory language permitting consideration of "other economic factors" that a Commissioner believes to be relevant.

Senator **Leahy**. Well, you talked about looking at basic economics in this, but Commissioner Eckes thinks that you, to use his words again, substitute "abstract economic models" for the statutory criteria.

Now, I understand six national union presidents wrote to Senator Biden and they have accused you of, quote, "the substitution of theoretical econometric models and proxies for direct injury analysis." Is that a fact? I mean, does your approach owe more to economic analyses than to analyses of what the Congress intended?

Ms. **Liebeler**. Senator, I use very elementary economic analysis, but I think that the economic factors that Congress set forth in the statute have to be analyzed that way. I would point out, Senator, that I believe in the record is an August 7th, 1986, letter from a group of individuals interested in trade policy who are political scientists and people throughout the Washington area from the Brookings Institute and other places that I am sure the Senator is familiar with. These individuals have suggested that the analytical approach that I have provided has been a welcome improvement to the causation analysis at the Commission.

I use standard analytical techniques. I am not trained as an economist and the idea that I could use a theoretical model, and use it well, is not one that I would be comfortable with. I do not use abstract or theoretical principles beyond which I am comfortable speaking about. I am not trained as an economist, although I do have economists on my staff.

Senator **Leahy**. Well, let me ask you about that, because the Senate Finance Committee, in its report on the Omnibus Trade Act of 1987, said the following, and let me quote them:

> The committee is of the view that the determination of material injury must be made on a case-by-case basis, by applying the enumerated statutory factors in the particular circumstances of the industry under investigation. The committee disapproves determinations by individual Commissioners that rely upon the mechanistic application of factors or formulas that remain constant from case to case, but are not enumerated in Section 771(7) [of the statute].

Could we read this as being directed at your decisions in dumping cases?

Ms. LIEBELER. Senator, I——

Senator LEAHY. Should we read this as being directed to your decisions in dumping cases?

Ms. LIEBELER. Senator, I do, so I think that it is reasonable for others to believe it is directed at me. However, I have never used a mathematical formula or anything like that to make a decision under the dumping laws.

Now, I do use, Senator, a benchmark analysis of 2.5 percent in some cases, but it is not necessarily the end of the inquiry. It depends on market conditions whether I——

Senator LEAHY. And you do not think they are referring to the five-factor test?

Ms. LIEBELER. They may well be referring to the five-factor test, Senator, and I am aware that this language is in the Senate report. They may well be referring to my five-factor analyses, but I think that they may be misinformed as to whether I use mathematical formulae in lieu of the statutory criteria.

Senator LEAHY. Why would they be misinformed? I mean, they can read your opinions.

Ms. LIEBELER. Yes, they can, Senator, and if Congress legislates——

Senator LEAHY. Do you think they misinterpreted them?

Ms. LIEBELER. They could misinterpret them, but that is the prerogative of Congress. If Congress changes the statute, obviously I would take my instruction from the amended statute. I do believe that the excerpt from Commissioner Eckes' opinion that you read mischaracterizes my analysis, however.

Senator LEAHY. You do not think they were giving instructions to the ITC, or do you?

Ms. LIEBELER. Oh, yes, Senator. I do not disagree with you that that is what this might be, but the statute has not yet been passed, Senator, as I am sure you know.

Senator LEAHY. I understand.

Ms. LIEBELER. But it is certainly in there and it may well be——

Senator LEAHY. It is an area where the Finance Committee members are really the experts on this more than the Judiciary Committee members, and that is why I was concerned about what they were saying.

Ms. LIEBELER. And, Senator, that is exactly why I set forth my analytical framework very precisely in my opinions. I think it facilitates Congressional oversight as well as review by the courts. If the statute is changed, I would take my instruction accordingly.

Senator LEAHY. The reason I am spending so much time on it is I understand that your use of the five-factor test, your reliance, really, as I see it, on the need to show predatory dumping—you never got a majority to go along with you on the ITC, is that correct?

Ms. LIEBELER. A majority of the Commissioners has not adopted my five-factor test, but I have voted with the majority of the Commission on cases.

Senator LEAHY. I understand, but they have not adopted that. So there has not been a case where you have a majority opinion with the five-factor test that could go up on appeal. That is what I am leading to.

Ms. LIEBELER. Senator, in fact, there are cases where this issue is on appeal. What happens is that different Commissioners have different analytical approaches and sometimes one or two or more Commissioners issue separate views.

Sometimes, the majority is made up of three or four separate opinions. There are cases before the Court of International Trade right now where I am in the majority and if my analysis were found incorrect by the court, I think the majority would fail.

I cannot remember whether the vote in those cases was four-one or three-two. I would have to check the record for you.

Senator LEAHY. They have not reached a decision yet?

Ms. LIEBELER. No.

Senator LEAHY. Those are on appeal?

Ms. LIEBELER. That is right.

Senator LEAHY. Could you provide afterwards citations to those cases?

Ms. LIEBELER. Certainly, Senator.

[See appendix.]

Senator LEAHY. I do not know what Senator Grassley's time constraints are, so I will yield to him at this point. I will have more questions, but I realize that——

Senator GRASSLEY. I appreciate that, Mr. Chairman, and before I ask my questions I would like to ask for inclusion in the record, by unanimous consent four letters of support from Ambassador John Shad, Dean Price, Dean Lewin, and Professor Sykes, and a number of law school deans and professors.

Senator LEAHY. Certainly, they will be included in the record and, naturally, should the Senator from Iowa or the Senator from South Carolina or others have other letters of support, naturally, the record will be kept open for them.

[See appendix.]

Senator GRASSLEY. As you may know, Commissioner Liebeler, I, probably no different than some of my colleagues on this committee, have one principal concern with respect to any judicial nominee, and that would, of course, come after satisfying myself first about the questions of integrity and professional qualifications, but that one question is whether or not the nominee is going to exercise self-restraint, self-restraint which forces the judge to accept statutes as the rule of decision irrespective of his or her personal views.

I do not think I can emphasize that standard well enough. I raised it with Judge Bork when he was before us and other people who supported him for 3 weeks of hearings. I just had the occasion this morning to raise it with Judge Ginsburg when I met with him in my office.

Particularly, appellate judges, it seems to me, lose their legitimacy when they expand or restrict established legal doctrine based solely on their personal views of what they might feel is wise policy. Policy decisions are largely the province of the legislative branch of government, not that of unelected judges.

Commissioner, I have had a chance to read a fair amount of criticism of your approach to decisionmaking at the ITC. My question is relatively simple. What can you say to demonstrate to this Senator that as a life-tenured appellate judge you will set aside your strongly-held personal views and apply settled law as written by the Congress?

Ms. LIEBELER. Senator, I agree wholeheartedly with the statements that you made about the appropriate role of an appellate judge, and I can assure you that I would do so. I can also assure you, Senator, in my tenure as a Commissioner I have and obviously everyone has views—but I have used my best efforts to not allow those views to interfere with my responsibilities to make impartial, open-minded decisions under the statutes as Congress has written them.

Senator GRASSLEY. Then along that line, could you cite for me specific ITC cases where your ruling, while supported by the facts and the law, conflicted with a personal pro-free-market approach?

Ms. LIEBELER. I can do that, Senator, if you will give me a moment. I would call your attention, Senator, to the following cases. All of the following cases are anti-dumping cases and they are all preceded with a 731 number, so I will just give you the number and the product. Do you want the country, too, or would you like me to submit it for the record?

Senator GRASSLEY. Submit it for the record to save time.

Ms. LIEBELER. Okay.

[See appendix.]

Senator GRASSLEY. But these, in your judgment, then, fall into this category in response to the question I asked where, regardless of your pro-free-market approach, the decision is based——

Ms. LIEBELER. I have voted affirmatively in anti-dumping cases. And, Senator, I would also point out that in two major escape clause cases I reached an affirmative determination and in one of them I recommended adjustment assistance.

Senator GRASSLEY. Okay. As an ITC Commissioner, you were at times very critical of some proposed trade legislation. For example, it was reported that in an October 27th, 1986, speech to the American Association of Exporters and Importers, you criticized congressional efforts to prevent the ITC from excluding gray market goods.

Without getting into the merits of such a policy, if Congress, against your better judgment, enacted such a "bad law," would you as a judge feel any urge to correct Congress' mistake?

Ms. LIEBELER. Of course not, Senator. That is Congress' call. Senator, if I may——

Senator GRASSLEY. Yes.

Ms. LIEBELER. Concerning the question that you just asked me, I did speak on what I thought the optimal policy for gray market goods ought to be, but I suggested that it was an issue that should be resolved by Congress.

I was not necessarily critical of what Congress might do. I thought the gray market issue should be resolved by Congress and I gave what I thought was the best approach. Perhaps it will not be the approach followed by Congress, however.

Senator GRASSLEY. Well, you know, I can rhetorically ask, then, as a follow-up to your answer that you just gave me about bad law, why not, because do you not think that Congress as a co-equal branch of government should have the opportunity to correct judgment errors made by legislatures?

Ms. **LIEBELER**. Congress should?

Senator **GRASSLEY**. Or the courts should as a co-equal—I am sorry. I did say Congress; I meant to say the courts.

Ms. **LIEBELER**. Okay. I think Congress should correct its own mistakes, and I do not think that is up to the courts to do so unless you are talking about some violation of the Constitution.

Judges are not elected by voters, and there is one nice thing about Congress; they are. I think it is a mistake for judges to make law.

Senator **GRASSLEY**. As a judge, you would be called upon many, many times to make interpretation of congressional intent. I would like to have you tell me your views on legislative history. In other words, how would you seek to find congressional intent?

Ms. **LIEBELER**. The first place I would look is the relevant statute. If it were clear in the statute, I might not go to the legislative history. But if there were an ambiguity or a question that still——

Senator **GRASSLEY**. Well, under the case where the statute is clear, obviously, there would not be any point of going to legislative history.

Ms. **LIEBELER**. Sure.

Senator **GRASSLEY**. But beyond that, to what extent would you seek the legislative history?

Ms. **LIEBELER**. I would read the legislative history very carefully, Senator, as I do now in the issues that arise under the trade law, and seek to determine congressional intent in the legislative history.

Senator **GRASSLEY**. Okay. I would like to then ask you as a followup of that how much weight would you give to committee reports and floor statements by Members of Congress?

Ms. **LIEBELER**. Without a more specific example, I would be inclined to give more weight to the committee report than the floor statement of an individual Member, but that does not mean I would disregard the floor statement of the individual Member.

Senator **GRASSLEY**. I think maybe I really should ask that as two separate questions, although I think your answer is appropriate. But how much weight would you give committee reports on the one hand as one way of judging, and then how do you respond to floor statements by Members of Congress as two separate approaches to getting legislative history?

Ms. **LIEBELER**. I certainly think that committee reports are very important and they are important source for me on the ITC. Let us assume there are two committee reports on the legislation, one of which is the subject of active debate on the floor.

That part of the committee report which is debated on the floor, it seems to me, becomes even more compelling and stronger. I think the committee reports are a very useful, very important source of finding congressional intent.

Senator **GRASSLEY**. Mr. Chairman, I am done.

Senator **THURMOND**. Thank you very much.

Senator **GRASSLEY**. Thank you very much.

Ms. **LIEBELER**. Thank you, Senator.

Senator **Thurmond**. Ms. Liebeler, I want to welcome you back to the committee today. This is the second and last hearing on your nomination and I would like to say that I have been impressed by your forthrightness and patience in testifying before this committee. I have just a couple of questions I would like to propound to you.

Ms. Liebeler, it is my understanding that the ITC routinely refers many cases to administrative law judges for an initial determination. After these judges make their determination, then the ITC takes the matter up for review much like the circuit court of appeals would.

What standards do you apply in reviewing the work of these administrative law judges?

Ms. **Liebeler**. Senator, I tend to give great deference to the administrative law judge, who is an experienced trier of fact who has heard the case and made a record. I review the judgment of the ALJ under ITC rules to see if a material fact is clearly erroneous, if a legal conclusion is erroneous, without precedent or an abuse of discretion.

Under our rules, the Commission can decide to review an ALJ if the determination affected ITC policy. But it is my position that great deference should be given to the trier of fact.

Senator **Thurmond**. Ms. Liebeler, you are an attorney who has taken an oath of office to faithfully uphold the laws as written. Would there ever be an instance where you would let your personal philosophy interfere with your obligation?

Ms. **Liebeler**. I would hope not, Senator. I would try very hard not to let it do so.

Senator **Thurmond**. That is all the questions I have right now. Thank you, Mr. Chairman.

Senator **Leahy**. Thank you, Senator.

There is a trade issue on which your views have been disapproved by reviewing courts. It involves Section 337 of the Trade Act. The section requires the Commission to determine whether a domestic industry has been injured by imports of products that infringe intellectual property rights such as patents and trademarks. As I understand it, only if the Commission finds injury can it ban those imports.

Now, the concern is not on the question of the merits of your views. In fact, there is substantial support for your views on the merits throughout the Congress, as reflected in some of the provisions of the trade bill which is now before a conference committee. I am a conferee on that.

The issue, though, is whether you follow the binding precedents in your decisions in the ITC. You have taken the view that a finding of injury is virtually automatic once it is established that a domestic industry's intellectual property rights, its patent or trademark rights, for example, have been infringed.

The Court of Appeals for the Federal Circuit has been equally clear under the trade laws that a finding of injury should not be automatic. Let me quote from the *Textron* case of 1985.

> Section 337 does not function merely as an international extension of our patent, trademark and copyright laws. * * * Instead, Section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof.

Now, the Federal circuit reaffirmed this view in the 1986 *Corning Glass Works* case, but it is said that you continue to assert that proof of infringement of a patent or a trademark is sufficient without any further evidence to satisfy the injury requirements of Section 337. I have had brought to my attention the *Woodworking Machines* case, decided in May of this year, in which you expressed this view.

So my question is, do you believe that the decisions of the Federal circuit on the question of injury under Section 337 are binding on the ITC?

Ms. LIEBELER. I certainly do, Senator, and may I respond to a point that you made?

Senator LEAHY. Of course.

Ms. LIEBELER. I am sorry. I think you have been misinformed, Senator. The *Woodworking* publication date was the date that it was printed by the Printing Office. That is the date that may have been mistakenly picked up.

I issued my opinion in *Woodworking* 10 months before the Federal circuit decision in *Corning Glass.* I have spoken on injury post-*Corning,* and I have followed the criteria set forth in *Corning Glass.*

Senator LEAHY. What are some of the areas where you spoke on it post-*Corning?*

Ms. LIEBELER. I will give you a list of those.

Senator LEAHY. Would you, please?

Ms. LIEBELER. I will be glad to give you a list of those decisions.

Senator LEAHY. Thank you.

[See appendix.]

Ms. LIEBELER. Senator, the main one that comes to mind is the largest such case that the Commission has had and I do not know why I did not mention it. The Commission has recently decided a major intellectual property case involving Texas Instruments' patents on DRAMs. In that case I was in the majority and applied the injury definition set forth in the *Corning* decision, and I will supply it for the record, as well as other citations.

Senator LEAHY. You have also taken a position, as I understand it, based on your conclusion that Congress meant to outlaw only dumping that involves predatory pricing. In a case involving steel from Thailand and Venezuela, you wrote that imports should be presumed *not* to be the cause of material injury unless imports have at least 2.5 percent of the total market. Have I correctly stated your position in that case?

Ms. LIEBELER. Yes, but the position is a little fuller than that, Senator. If I might expound—I assume that if someone had 2.5 percent of the market, absent unusual circumstances such as highly inelastic conditions of domestic supply and demand, a 2.5 percent market share would not have an impact on the market price and would not be likely to cause the injury.

Senator LEAHY. How do you get the 2.5 percent? Is that somewhere either in the statute or the legislative history?

Ms. LIEBELER. Senator, it is not. If you would like me to tell you why I did it and how I got the number, I would be happy to discuss it.

Senator LEAHY. Go ahead.

Ms. **Liebeler**. Okay. I had been at the Commission for a period of time and we had a series of cases in which small market shares were involved. I was reaching negative determinations in some of those cases. I read a lot of Commission decisions before that time to see if I could find a standard that I could articulate that would indicate that a player was so small that that player could not have much or any impact in a market.

I looked at these decisions and I decided that 2.5 percent was such a standard. Obviously, however if domestic supply or demand were highly inelastic, I would not reach that conclusion and I have so stated in many opinions. I always look in the record to see what we know about conditions of supply and demand.

Senator **Leahy**. Well——

Ms. **Liebeler**. Senator, it is like an economic presumption.

Senator **Leahy**. Right.

Ms. **Liebeler**. It is not a presumption of law. I use it as sort of an economic presumption.

Senator **Leahy**. Well, is there anything in the Commission's precedents which supported the 2.5 percent?

Ms. **Liebeler**. There is nothing in Commission precedent that would support it or, I felt, preclude it either.

Senator **Leahy**. Senator Heinz wrote you a letter in 1985 in which he stated that there had been several other steel-related cases in which the Commission had found material injury even though there was less than 2.5 percent; I think it was even down below one percent. Is that accurate?

Ms. **Liebeler**. I have not looked at that letter in a long, long time and I would have to see——

Senator **Leahy**. Well, have there been cases where the Commission has found injury with respect to imports with market share of less than 2.5 percent and down to one percent?

Ms. **Liebeler**. I believe that is correct.

Senator **Leahy**. Were those decisions wrong?

Ms. **Liebeler**. Senator, in cases in which I did not participate, I cannot say if they were rightly or wrongly decided because I would not have had access to the record in those cases and I cannot say that I would have reached a different conclusion.

Senator **Leahy**. Thank you.

Senator Thurmond, just before you came in, Senator Grassley had mentioned he had some letters of support and I noted that, naturally, the record would stay open for any letters of support for Ms. Liebeler, as well as, of course, letters in opposition. Obviously, you have the right to respond to all those. Naturally, we would keep the record open for you to do that.

Ms. **Liebeler**. In writing, Senator?

Senator **Leahy**. Sure.

Ms. **Liebeler**. I could do something like that in writing?

Senator **Leahy**. Of course.

Ms. **Liebeler**. Oh, thank you.

Senator **Leahy**. I am just thinking, out of fairness to Ms. Liebeler, if somebody writes a letter and it has been included in the record in opposition to her, I think out of fairness she ought to have a chance to be able to respond to it, or at least have the option. You can or cannot, as you want, but if you want to, naturally, I am going to keep the record open for you to do that.

Ms. LIEBELER. Thank you. I appreciate that, Senator.

Senator LEAHY. Representative Don Pease wrote to Senator Biden that, you have a "tendency to give greater weight to ideological predilection than to congressional intent."

I will toss that one over to you. You go ahead.

Ms. LIEBELER. With respect, Senator, I think that Congressman Pease is mistaken. I am sorry he feels that way. I think he is mistaken.

Senator LEAHY. Well, the reason I have raised these is because when you get enough complaints in, naturally, it creates concern. I can tell you that six major unions—the Auto Workers, Steel Workers, Electrical Workers, Clothing and Textile Workers, Ladies Garment Workers, and Mine Workers—wrote that you have, and I am trying to paraphrase this accurately, completely ignored the statutory framework of the trade laws and, instead, established an analytical structure of your own that bears no relationship to existing law.

In fact, one of the Commissioners wrote that you had "substituted academic fictions for the factual record and our own judgment," "our own" being the Commission's judgment. What do you say?

Ms. LIEBELER. Senator, I believe that my analysis and my decisions in these cases are consistent with the statute. I have taken an oath of office which I take very seriously. The cases at the ITC are very technical cases. The records are very complicated, and I call them as I see them.

Senator LEAHY. Do you call them based on the precedents and the law and not your own personal beliefs or ideology?

Ms. LIEBELER. Yes.

Senator LEAHY. That is basically the position you took before the Finance Committee when you were up for the ITC nomination, that you would apply the law and the precedents and not ideology?

Ms. LIEBELER. Yes, Senator.

Senator LEAHY. Of course, there are those who are concerned that you did not do that, and that is why we have these letters and that is why I wanted to raise it with you.

Let me ask, incidentally, has the FBI background report on your nomination been made available to you? Have you read it?

Ms. LIEBELER. No, I have not read it. I have no recollection of having seen it.

Senator LEAHY. Have you had a summary of the report made available to you?

Ms. LIEBELER. Senator, I do not think so. The FBI investigation and report was a long time ago. Was it not in 1986?

Senator LEAHY. Well, let me refresh your memory.

Ms. LIEBELER. I have no recollection of ever having seen it.

Senator LEAHY. Let me refresh you. Normally, they would not be shown to a——

Ms. LIEBELER. Okay, that is what I was concerned about.

Senator LEAHY. They would normally not be shown to a nominee.

Ms. LIEBELER. I did not think so.

Senator LEAHY. This is a very serious matter and I want you to think on it. In the summer of 1986, did you tell an employee of the

ITC that you were horrified to read in the FBI report some derogatory comments concerning your performance as Chairman of the International Trade Commission?

Ms. LIEBELER. Not to my——

Senator LEAHY. Do you recall that?

Ms. LIEBELER. Senator, I have no recollection of ever having seen any such FBI report.

Senator LEAHY. Normally, a nominee would not, and that is why I asked the question.

Ms. LIEBELER. What do such FBI reports say on them? I mean, I am not that familiar with FBI reports and I have not ordinarily been given FBI reports.

Senator LEAHY. Okay.

Ms. LIEBELER. Senator, I cannot ever recall having seen any such FBI report.

Senator LEAHY. That is why I wanted to raise the question because it would have been out of the normal procedure.

Ms. LIEBELER. No, I do not think so, Senator.

Senator LEAHY. Obviously, if you did not see the reports, you did not say to somebody you were horrified, or words to that effect, to read in the report derogatory comments about you.

Ms. LIEBELER. I would not say something like that. I have though, heard about derogatory comments made about me.

Senator LEAHY. I understand.

Ms. LIEBELER. And I may have been responding in that context.

Senator LEAHY. Sure.

Ms. LIEBELER. But I have not had the opportunity to read them.

Senator LEAHY. Okay, and I have tried to give you a chance, I hope you realize, to respond to the comments that have been made and that are here in the record.

Ms. LIEBELER. Thank you, Senator. I appreciate that.

Senator LEAHY. Naturally, the record will be open as long as you might need to be able to respond to those.

Let me yield to my distinguished senior colleague.

Senator THURMOND. Mr. Chairman, that is all the questions I have of her. Thank you very much.

Senator LEAHY. Thank you.

Ms. Liebeler, I appreciate you coming back. As I said, the record will remain open and if there are further matters that you wish brought up, naturally, notify us and we will.

Ms. LIEBELER. Senator Leahy, if I might, I plan to stay for the rest of the hearing and I would be happy to respond to any matters that are raised by witnesses, if you would like me to return.

Senator LEAHY. Thank you.

Senator THURMOND. I think it would be well if she stayed and responded now to save time.

Can you stay this morning and respond?

Ms. LIEBELER. Absolutely. That is what I would like to do.

Senator THURMOND. That would be fine.

Senator LEAHY. Thank you, Ms. Liebeler.

Next is a panel of David Elliott, the President of the Customs and International Trade Bar Association, accompanied by Frederick Ikenson; Clarence Kipps, the chairman of the judicial section committee of the Federal Circuit Bar Association; and Robert

Swecker, the president of the International Trade Commission Trial Lawyers Association accompanied by Steven Lipman and Tom Schaumberg.

Gentlemen, would you please come forward, Mr. Elliott, Mr. Ikenson, Mr. Kipps, Mr. Swecker, Mr. Lipman and Mr. Schaumberg? Would you gentlemen please stand and raise your rights hands? Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **ELLIOTT**. I do.

Mr. **IKENSON**. I do.

Mr. **KIPPS**. I do.

Mr. **SWECKER**. I do.

Mr. **LIPMAN**. I do.

Mr. **SCHAUMBERG**. I do.

Senator **LEAHY**. Let the record show that all witnesses are sworn in.

For the three witnesses, the normal rule would be 5 minutes for each. We will set the time at 15 minutes for the panel and then you can divide it up any way you want. That way, if the first person goes 14 minutes, rather than me, he can answer to the next two.

We will start with Mr. Elliott. Just knowing that your colleagues are watching you, Mr. Elliott, go right ahead.

TESTIMONY OF A PANEL CONSISTING OF DAVID O. ELLIOTT, PRESIDENT, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION, ACCOMPANIED BY FREDERICK IKENSON, CHAIRMAN, JUDICIAL SELECTION COMMITTEE, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION; CLARENCE T. KIPPS, JR., CHAIRMAN, JUDICIAL SELECTION COMMITTEE, FEDERAL CIRCUIT BAR ASSOCIATION; AND ROBERT S. SWECKER, PRESIDENT, INTERNATIONAL TRADE COMMISSION TRIAL LAWYERS ASSOCIATION, ACCOMPANIED BY STEVEN E. LIPMAN, CHAIRMAN, JUDICIAL SELECTION COMMITTEE, AND TOM SCHAUMBERG, PAST PRESIDENT

Mr. **ELLIOTT**. Thank you, Senator. My name is David Elliott and I appear here to comment on the nomination of Susan Wittenberg Liebeler for appointment as judge of the U.S. Court of Appeals for the Federal Circuit.

I am the president of the Customs and International Trade Bar Association and I am accompanied by Frederick Ikenson, the chairman of our judicial selection committee. Our association is a national organization well over a half a century old whose members are attorneys engaged in the practice of customs and international trade law.

In addition to representing importers, domestic manufacturers, exporters, customs brokers, surety companies, and others before the International Trade Commission, the Customs Service, and other Federal agencies, the association's members regularly practice before the Court of International Trade and its appellate court, the Court of Appeals for the Federal Circuit.

Consequently, our members are vitally concerned with the nominees to these courts, and therefore we have endeavored to evaluate the Executive's nominees and to provide our evaluation to this committee.

After having received, considered and deliberated over the report of our bar association's judicial selection committee and after having reviewed the reputation, writings, and qualities of Ms. Liebeler, the board of directors has formed the opinion that Ms. Liebeler is not qualified to serve as a judge on the Court of Appeals for the Federal Circuit.

Specifically, the board finds that the nominee lacks the necessary objectivity and judicial temperament. We make this finding with particular regret, since Ms. Liebeler has already acquired some experience in international trade law, a factor that ordinarily would be an asset to a nominee to the Federal circuit.

Our judicial selection committee conducted a careful and fair investigation into Ms. Liebeler's qualifications. Ms. Liebeler is, of course, Chairman of the International Trade Commission, an agency on which she has served since April 1984. Between 1973 and 1984, she was a law professor at Loyola Law School.

The committee conducted interviews of Ms. Liebeler, of other Commissioners, past and present, of past and present Commission personnel, of members of the former study body, faculty, and administration of Loyola Law School, and of numerous attorneys who have practiced regularly before the Commission.

The committee has also studied Ms. Liebeler's responses to questionnaires of our association, of the American Bar Association, and of the Senate Judiciary Committee, and has reviewed the police and court records associated with her arrest in Vermont in 1973, and has interviewed the former attorney general of Vermont who, in his capacity as State's attorney, had filed criminal charges against Ms. Liebeler.

Judicial selection committee members as well as the members of our board have studied and familiarized themselves with the written opinions and statements of Ms. Liebeler. Additionally, committee and board members, by virtue of their wealth of professional experience and their continuing practice and study, are extremely familiar with the relevant statutes, case law, administrative precedents and practices which form the body of trade law.

Our reasons for finding Ms. Liebeler not qualified are set forth in detail in the written report which we have submitted to your committee. We will not burden this hearing with a reiteration of the information contained in that report.

We will state, however, by way of summary that based upon the interviews, which are confirmed by her writings, Ms. Liebeler would appear to lack the objectivity and open-mindedness essential to the judicial temperament.

While all acknowledge her intelligence, she appears to reason from strong convictions or preconceptions which oftentimes are divergent from, if not contrary to, both statutory and decisional law.

Thus, in the anti-dumping and countervailing duty statutes, she writes into the law the requirement for predatory intent. In the unfair trade practices area, Section 337 of the trade law, by persisting in reading out the requirement of a separate injury finding, she refuses to abide by the decisions of the very court to which she aspires.

We do not believe that the frequently-voiced criticism of Ms. Liebeler can be lightly dismissed. She has been described over and over again as one lacking in judicial temperament, as one uncomfortable with the law, as one who disagrees with the law, and as one who does not feel constrained by the law. Her written opinions appear to confirm rather than rebut those descriptions.

That concludes our statement and we would be pleased to answer any questions.

[Statement follows:]

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

October 30, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: SUSAN WITTENBERG LIEBELER
United States Court of Appeals for the Federal Circuit

Dear Senator Biden:

The purpose of this letter is to inform you of the opinion of the Board of Directors of the Customs and International Trade Bar Association pertaining to the nomination of Susan Wittenberg Liebeler for appointment as Judge of the United States Court of Appeals for the Federal Circuit.

A substantial majority of our Board of Directors is of the opinion that Mrs. Liebeler is "Not Qualified" for this appointment. The minority found her to be "Qualified". The Report of our Board is enclosed.

Sincerely,

David O. Elliott

Enclosure

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

REPORT OF THE BOARD OF DIRECTORS OF THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION ON THE NOMINATION OF SUSAN WITTENBERG LIEBELER TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OCTOBER 30, 1987

Introduction

This Report is submitted by the Board of Directors of the Customs and International Trade Bar Association on the nomination of Susan Wittenberg Liebeler to the United States Court of Appeals for the Federal Circuit.

The Customs and International Trade Bar Association is a national organization, well over a half-century old, whose members are attorneys engaged in the practice of customs and international trade law. In addition to representing importers, domestic manufacturers, exporters, customs brokers, surety companies, and others before the International Trade Commission, the Customs Service, and other federal agencies, the Association's members regularly practice before the Court of International Trade and its appellate court, the Court of Appeals for the Federal Circuit.

Consequently, our members are vitally concerned with the nominees to these courts and, in fact, we perform two related but distinct functions with respect to judicial appointments. One, from time to time, we recommend, for the consideration of the Executive Branch, persons believed by us to be qualified and experienced in international trade law. Two, we endeavor to evaluate the Executive's nominees and to provide our evaluation to the Committee on the Judiciary of the United States Senate.

After having received, considered, and deliberated over the report of the Bar Association's Judicial Selection Committee and after having reviewed the reputation, writings, and qualities of Mrs. Liebeler, the Board of Directors has formed the opinion that Mrs. Liebeler is not qualified to serve as a judge on the Court of Appeals for the Federal Circuit. Specifically, the Board finds that the nominee lacks the necessary objectivity and judicial temperament. We make this finding with particular regret since Mrs. Liebeler has already acquired some experience in international trade law, a factor which ordinarily would be an asset to a nominee to the Federal Circuit.

Our Judicial Selection Committee conducted a careful and fair investigation into Mrs. Liebeler's qualifications. Mrs. Liebeler is, of course, Chairman of the International Trade Commission, an agency on which she has served since April 1984. Between 1973 and 1984, she was a law professor at Loyola Law School. The Committee conducted interviews of Mrs. Liebeler, of other Commissioners past and present, of past and present Commission personnel, of members of the former student body, faculty, and administration of Loyola Law School, and of numerous attorneys who have practiced regularly before the Commission. The Committee has also studied Mrs. Liebeler's responses to questionnaires of our Association, of the American Bar Association, and of the Senate Judiciary Committee, has reviewed the police and court records associated with her arrest in Vermont in 1973, and has interviewed the former Attorney General of Vermont who, in his capacity as State's Attorney, had filed criminal charges against Mrs. Liebeler. Judicial Selection Committee members as well as the members of this Board have studied and familiarized themselves with the written opinions and statements of Mrs. Liebeler. Additionally, Committee and Board members, by virtue of their wealth of professional experience and their continuing practice and study, are extremely familiar with the relevant statutes, case law, and administrative precedents and practices which form the body of trade law.

Our reasons for finding Mrs. Liebeler "Not Qualified" are set forth below. We will begin by discussing the comments of various Commissioners, staffers, practicing attorneys, and members of the Loyola Law School community. We will then proceed with a discussion of the decisions and opinions that Mrs. Liebeler has rendered while sitting on the Commission. Finally, we will comment on the Vermont incident.

Interviews of Commissioners, Commission Staff, and Practicing Trade Attorneys

In its investigation, the Judicial Selection Committee interviewed all Commissioners who serve or who have served with Mrs. Liebeler on the International Trade Commission. The Committee has also interviewed numerous practicing trade lawyers and Commission staff personnel.

During those interviews, Mrs. Liebeler was repeatedly described in the following terms or language similar thereto: "Intelligent" or "Very intelligent"; "Ideologue"; "Totally lacking in objectivity"; "Prejudiced"; "Result-oriented"; "Totally unsuited for the bench"; "Temperamentally unfit" or "Unquestionably not fit" to be a judge; "She would not be a fair and objective judge"; "She does not have judicial temperament"; "She proceeds theoretically rather than by evaluating facts"; "Her judgment gets clouded by her ideals and lack of trust"; "She is unable to work with people she disagrees with"; "She disagrees with the law and does not feel constrained by the law"; "She is uncomfortable with the statutory task of the Commission which, from time to time, requires providing protection [under the antidumping and countervailing duty laws]".

One person, who expressed personal fondness for Mrs. Liebeler, opined that she "would make an awful judge -- on patents [19 U.S.C. § 1337 cases], she would be overly protectionist; on antidumping and countervailing duty cases, she would craft ways to gut the statutes." She was also described as "lacking intellectual honesty", as having "knowingly reasoned improperly to avoid protection", as being "hostile" to federal employees.

On the other hand, one Commissioner opined that Mrs. Liebeler would make a "superb judge". This Commissioner stated that Mrs. Liebeler, in addition to being "extremely intelligent", "knows the law" and has "enormous ability"; she has "high standards" and has the "courage of her convictions". Also, a reputable practicing attorney, whose substantive positions Mrs. Liebeler has consistently voted against, opined that Mrs. Liebeler should be confirmed as a judge. This attorney, acknowledging her intellectual ability, expressed the opinion that Mrs. Liebeler has demonstrated great "courage" by remaining steadfast in her views in the face of intense and often shrill criticism directed toward her from numerous sources, including her colleagues, practicing lawyers, and members of Congress.

Interviews of Members of the Loyola Law School Community

As noted, the Judicial Selection Committee conducted interviews of members of the former student body, faculty, and administration of Loyola Law School. The opinions of those persons interviewed were essentially consistent with the opinions of the vast majority of those persons interviewed of the trade law community. Thus, she was described as "Intelligent" - but, again, she was repeatedly described as an "Ideologue" or an "Ideologue enamored of economic solutions to everything"; as "Not objective"; as "Not open-minded"; as one who "prejudges issues"; as one who "could not work well with other people"; as one who "could not get along with the vast majority of the faculty and administration; as one who was "disdainful of most of the student body".

She was repeatedly described as "not a good" teacher, who had "difficulty communicating", who did not appear to like teaching, and who was unpopular with the students because of her "arrogance, impatience, and lack of clarity in the classroom".

She was repeatedly viewed as one who did not have the judicial temperament to be a judge.

Commission Opinions

The most frequent and troubling comments regarding Mrs. Liebeler by those interviewed -- that she is an ideologue lacking in objectivity and dispassionate reasoning -- appear to be confirmed by Mrs. Liebeler's opinions as a Commissioner.

A review of Mrs. Liebeler's opinions filed in antidumping, countervailing duty and unfair act (19 U.S.C. § 1337) cases leads to the conclusion that Mrs. Liebeler consistently decides cases based on her belief as to what the law ought to be rather than on the basis of criteria enunciated in the statutes. This conclusion is consistent with the views of other Commissioners as reflected in their opinions in the same cases, in critiques of Mrs. Liebeler's opinions found in the opinions of other Commissioners (e.g., Commissioner Eckes in Certain Ethyl Alcohol From Brazil, Inv. Nos. 701-TA-239 and 731-TA-248 (Final), USITC Public. 1818 at 40-53 (March 1986), and Commissioner Stern in In the Matter of Certain Aramid Fiber, Inv. No. 337-TA-194, USITC Public. 1824 at 8-9 n.15 (March 1986)), in the report of the Committee on Ways and Means of the U.S. House of Representatives on H.R. 3 (the Trade and International Economic Policy Reform Act of 1987) (H.R. Rep. No. 40, Part 1, 100th Cong., 1st Sess. 127-31 (1987)), and in the report of the Committee on Finance of the U.S. Senate on S. 490

(the Omnibus Trade Act of 1987) (S. Rep. No. 71, 100th Cong., 1st Sess. 115-18 (1987)), as well as in published and unpublished comments of practitioners before the Commission.

We emphasize that this conclusion is not directed to Mrs. Liebeler's interpretations of the statutes, or to whether her opinions are "right" or "wrong". We are most mindful of the duty of an adjudicative official to interpret a statute consistently with that official's determination of the intent of the legislature, and that responsible persons will differ in their perceptions of legislative intent. In general, we accept that views expressive of such differences are not a reason to find a nominee to a federal appellate court to be unqualified.

The issue which Mrs. Liebeler's opinions raise is that she consistently rejects the guidance of the Congress as set forth in the statutes governing antidumping, countervailing duty, and unfair act cases and replaces it with decisional criteria of her own creation. Her opinions reveal that Mrs. Liebeler's biases lead her to oppose relief for domestic industry in antidumping and countervailing duty cases without considering the governing statutory criteria and to favor relief for domestic industry in unfair act cases also without considering the governing statutory criteria.

In antidumping and countervailing duty cases, the statute requires the Commission to determine whether a domestic industry is materially injured or is threatened with material injury by reason of dumped or subsidized imports. Material injury is "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). Congress has not limited the range of factors which the Commission may consider in rendering the injury determination. However, Congress has specified that the Commission shall consider (1) the volume of imports which are subject to the investigation, (2) the effect of such imports on prices in the United States for like products, and (3) the impact of such imports on domestic producers of like products. 19 U.S.C. § 1677(7)(B). Further, Congress has specified that (1) in evaluating the volume of imports, the Commission shall consider whether the volume of imports or any increase in such volume is significant; (2) in evaluating the price effect of imports, the Commission shall consider, *inter alia*, whether prices of dumped or subsidized imports undercut prices of like domestic product to a significant degree or prevent price increases; and (3) in examining the impact of dumped or subsidized imports on domestic producers of competing goods, the Commission shall evaluate all relevant economic factors, including the actual and potential decline in sales which those producers face. 19 U.S.C. § 1677(7)(C). Finally, Congress has specified that the Commission shall cumulatively assess the volume and effect of imports from two or more countries "of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market." *Id*.

Mrs. Liebeler does not follow this statutorily mandated analysis which focuses on objective economic factors. Rather, her analysis, set forth initially in *Certain Red*

Raspberries From Canada, Inv. No. 731-TA-196 (Final), USITC Public. 1707 (June 1985), starts from the premise that the antidumping and countervailing duty laws are intended to combat predatory import practices which requires analysis of subjective intent:

> The fact that Congress referred to unfair price discrimination suggests to believe [sic] that Congress meant some type of predatory pricing. Predatory pricing is a form of strategic behavior in which a firm lowers the price of its product below the marginal cost of production.

Id. at 14 (emphasis in original). Thus, Mrs. Liebeler reads into the statute something which cannot be found in its text -- a requirement that predation be present for material injury to exist. In fact, the criteria enunciated in the statute for the determination of injury are entirely objective and do not depend on subjective considerations involving intent.

Mrs. Liebeler stated that "ideally" the Commission would gather cost of production data, but that since this is difficult to accomplish, "the Commission must look to relevant proxies." She believes that "market share and pricing trends are the appropriate subjects for examination. Although this information is not dispositive of the predation issue, large and growing market share and deteriorating price trends are necessary conditions for a predatory behavior." Id. at 15.

Because Mrs. Liebeler believes that material injury cannot exist in the absence of predatory intent, she has established criteria to govern her analysis to the exclusion of the statutorily mandated objective criteria:

(1) large and increasing market share;

(2) high dumping margins;

(3) homogeneous products;

(4) declining prices; and

(5) barriers to entry to other foreign producers (low elasticity of supply of other imports).

Id. at 16. Mrs. Liebeler's consistently expressed belief is that material injury cannot exist unless at least several of these criteria are strongly manifested in a given case. Thus, in Agricultural Tillage Tools From Brazil, Inv. No. 701-TA-223 (Final), USITC Public. 1761 at 24-27 (Oct. 1985), she found to be legally insignificant a 15.9 percentage point increase in market share by subsidized imports, an 8.06 percent subsidy rate, and a price decline in one of two sizes of the merchandise under consideration because (1) she did not find significant barriers to the entry of other imports and (2) since the subsidized imports were priced lower than the domestic product and since "[t]he greater the difference in the price of competing the [sic] goods, the more they differ," the price difference between the subsidized imports and the domestic goods implied a lack of homogeneity between them.

In Certain Welded Carbon Steel Pipes And Tubes From India, Taiwan, And Turkey, Inv. Nos. 731-TA-271 through 273 (Final), USITC Public. 1839 at 51 (April 1986), Mrs. Liebeler dispensed with the statutory requirement that price undercutting be considered, stating:

> We do not generally consider the "underselling margins" set forth in Commission reports to be particularly persuasive evidence of price undercutting or probative on the issue of causation. And we do not find the data on underselling gathered by the Commission in this case to be useful. In brief, when there are price differences we expect that they are usually explained by differences in the items compared. Rarely will all of the characteristics of the imported product exactly match those of the domestic product. Even when products appear to be identical (e.g., a bushel of wheat), a correct price comparison would have to take into account factors other than the exchange of ownership of the product. . . . Merely comparing transaction prices and making a seat-of-the-pants judgment that the products are "homogeneous" is not a useful exercise.

Further, in Certain Welded Carbon Steel Pipes And Tubes From Thailand And Venezuela, Inv. Nos. 701-TA-242 and 731-TA-252 (Preliminary), USITC Public. 1680 at 19 (April 1985), Mrs. Liebeler indicated that she believed that the Commission need not consider the criteria specified by Congress to render a material injury determination unless one of two conditions were met: either that the domestic market exhibit characteristics demonstrating that "a relatively small level of imports could result in any material injury or threat of material injury" or that there be "an import penetration ratio" of at least 2.5 percent.

Again, it is not our function to comment upon either the logic, the economic validity, or the wisdom of Mrs. Liebeler's views. It is our intention solely to provide examples of the abandonment of statutory criteria by Mrs.

Liebeler in favor of the criteria which she believes the Congress should have adopted.

It has been observed in various articles and other written comments that Mrs. Liebeler has also applied a test of cumulation different from that required by statute. In brief, Mrs. Liebeler refused to cumulate the volumes, prices and impact of dumped imports with subsidized imports and refused to cumulate data relating to goods under pending investigations with like goods which were the subject of recently issued remedial orders. In this instance, we do not conclude that Mrs. Liebeler's actions were contrary to the manifest language of the statute. We note only our deep concern that her strong ideological principles and less than objective approach have once again led her to conclusions which are contrary to the expressed legislative intent set forth in the congressional committee reports and which have been rejected by the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit. See Certain Carbon Steel Products From Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, And Venezuela, Inv. Nos. 701-TA-225 through 234 and 731-TA-213 through 217, 219, 221 through 226, 228 through 235 (Preliminary), USITC Public. 1642 at 41-50 (Feb. 1985), and Oil Country Tubular Goods From Canada And Taiwan, Inv. Nos. 701-TA-255 and 731-TA-276 and 277 (Final), USITC Public. 1865 at 15-20 (June 1986). See also Bingham & Taylor, Division, Virginia Industries, Inc. v. United States, 10

CIT __, Slip Op. 86-14 (Feb. 14, 1986), and Id. v. Id., 815 F.2d 1482 (Fed. Cir. 1987).

A second category of cases in which the Commission is required to render an injury determination is unfair act cases under section 337 of the Tariff Act of 1930. This section requires the Commission to determine whether the effect or tendency of unfair methods of competition and unfair acts in the importation of articles is to destroy or substantially injure a domestic industry. 19 U.S.C. § 1337. Frequently, the unfair act complained of is infringement of intellectual property rights such as trademarks and patents.

In this type of case, apparently due to her conviction that intellectual property rights deserve automatic protection, Mrs. Liebeler rejects the Commission's obligation to make the statutory injury determination and employs a *per se* injury rule instead. She has stated:

> Importation of a product which infringes a valid patent will *always* affect the patent holder adversely. . . . The Commission should, therefore, employ its most lenient injury test in Section 337 patent cases.
>
> There is no reason why the Commission's standards in Section 337 cases should differ significantly from those used by district courts in intellectual property cases. In that forum there is strict liability for patent infringement; infringement alone justifies an injunction. . . . The construction of elaborate and strict injury tests is neither contemplated by the statute, nor does it serve any public purpose.

In the Matter of Certain Optical Waveguide Fibers, Inv. No. 337-

TA-189, USITC Public. 1754 (Sept. 1985) (Views of Vice Chairman Liebeler at 1-2) (emphasis in original).

Mrs. Liebeler issued the foregoing views in September 1985, eight months after the United States Court of Appeals for the Federal Circuit had issued its decision in Textron, Inc. v. U.S. International Trade Commission, 753 F.2d 1019, (Fed. Cir. Jan. 24, 1985), wherein the court had ruled (at 1028-29):

> Contrary to Textron's assertion, section 337 does not function merely as the international extension of our patent, trademark and copyright laws. See In-the-Ear Hearing Aids, Tariff Commission Publ. No. 182 at 28 (July 1966). Instead, section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof. Id. Congress may well have included this separate requirement in the original 1930 version of section 337 to insure that the extreme and internationally provocative remedy contemplated therein -- exclusion of imports from particular countries -- would be implemented only when this is compelled by strong economic reasons. See, e.g., S. Rep. No. 93-1298, 93d Cong., 2d Sess. 199 (1974); reprinted in 1974 U.S. Code Cong. & Ad. News 7186, 7331. Although the contemplated range of remedies was expanded by the Trade Act of 1974 to include "softer" sanctions such as cease-and-desist orders, Congress has never altered the statute's injury requirement. In fact, Congress expressly rejected a Nixon Administration attempt to eliminate the injury requirement in its proposed Trade Reform Act of 1973. See H. Kaye, et al., International Trade Practice § 6.05 n.1 (1984).

Mrs. Liebeler's apparent unwillingness to put aside her personal beliefs where a court has ruled against her position is shown further by her opinion in In the Matter of Woodworking Machines, Inv. No. 337-TA-174, USITC Public. 1979

(May 1987):

> With regard to the industry [sic: injury] issue, I note that there is evidence on the record that woodworking machines that infringe the two registered trademarks, the one common-law trademark, and the registered logo have been imported into the United States and sold to consumers. This evidence is sufficient to establish injury and tendency to injure for these industries. Similarly, there is evidence on the record that establishes that woodworking machines that infringe the three patents have been imported into the United States and sold to consumers. This is sufficient to establish injury and tendency to injure for these three industries.

Additional Views of Vice Chairman Liebeler at 1-2.

Mrs. Liebeler issued the foregoing statement in May 1987, more than two years after the court's Textron decision and nine months after the court's ruling in Corning Glass Works v. U.S. International Trade Commission, 799 F.2d 1559, 1567 (Fed. Cir. Aug. 27, 1986). In the Corning decision, the court quoted the language of the Textron decision set forth above and then stated:

> Because section 337 does not function merely as an international extension of private rights under the patent statute, the statements of this court on the showing of injury required for the grant of an injunction in a patent infringement suit cannot be taken out of context and applied to the issuance of an exclusion order in a section 337 proceeding. Upon a patentee's proof of continuing infringement of a valid enforceable patent, "immediate irreparable harm is presumed" in connection with a request to a district court for injunctive relief. . . . Congress has, however, required more for an exclusion order against imports, as recognized by this court unequivocally in Textron. The Commission is, thus, correct in its statement, "[S]ection 337 has elements in addition to

> the establishment of the existence of unfair practices such as patent infringement which must be satisfied before relief [i.e., an exclusion order] can be granted." In re Certain Optical Waveguide Fibers, slip op. at 21 [majority opinion of Commission, from which Mrs. Liebeler dissented].

We, of course, are aware that the trade legislation currently under consideration by the Congress proposes to eliminate the injury requirement in section 337 cases involving certain intellectual property rights. The Association's members are divided on the desirability of this proposed change -- many support the change and many others oppose it. However, we are in agreement that unless and until this change is made in the law, the statute now in force and the court opinions interpreting it require, beyond any possible doubt, an injury determination in each section 337 case. Mrs. Liebeler's opinions in this area indicate that she does not acknowledge the supremacy of the statute and court decisions over her private views when called upon to perform her public duty as a Commissioner.

In sum, Mrs. Liebeler's writings as a Commissioner show that she opposes relief for domestic industry in antidumping and countervailing duty cases and favors relief for domestic industry in unfair acts cases on the basis of her personal beliefs as to what the laws ought to say rather than on the basis of what the laws and the court decisions interpreting them do say.

The Vermont Arrest

In her American Bar Association questionnaire response, Mrs. Liebeler indicated that, in 1973, she had been arrested in Vermont and charged with extortion and acting as an accessory to extortion. We have reviewed the court and police records relevant to the incident that gave rise to the arrest and the June 29, 1987 letter to Senator Leahy from Mr. M. Jerome Diamond, the former State's Attorney who had charged Mrs. Liebeler; our Judicial Selection Committee monitored the August 6, 1987 Senate Judiciary Committee hearing on Mrs. Liebeler and interviewed Mr. Diamond.

We are concerned, not just over the self-help incident that led to Mrs. Liebeler's arrest, but by the way in which she has attempted to explain the incident away. In her American Bar Association response, she explained that "a young and inexperienced State's Attorney, who had apparently been advising the tenant, filed charges against me." After noting that criminal charges against her were dropped, she proceeded to state: "There was no basis in law or fact for the criminal charges." She annexed a supporting letter from the attorney who had defended her at the time.

The prosecuting attorney, Mr. Diamond, slightly older than Mrs. Liebeler, was 31 years old when he charged her with a crime. He did so in his capacity as State's Attorney, a position to which he had been elected. The following year, he was elected to the first of three consecutive terms as Attorney General of the State of Vermont. During his interview with our

Judicial Selection Committee, Mr. Diamond categorically denied that he was representing the tenant at the time of his prosecution of Mrs. Liebeler. Further, a court found probable cause for the charges when it issued an arrest warrant and it again found probable cause when it denied the motion to dismiss.

We will not burden this report with a recitation of the facts alleged in the police and court records or with a summary of the testimony presented at the August 6, 1987 hearing; suffice it to say, however, that the explanation offered by Mrs. Liebeler for her arrest is too facile and is unsatisfactory.

Conclusion

It is with regret that we must conclude that Mrs. Liebeler is not qualified to be a judge on the United States Court of Appeals for the Federal Circuit. While her intellectual ability is undoubtedly substantial, the evidence strongly suggests that she lacks the objectivity and judicial temperament to be a judge. While some have remarked on her "courage" under fire or her having the "courage of her convictions", such traits are cause for grave concern when found in a person appointed to the judiciary to apply statutes as written by the Congress and interpreted by earlier court decisions, especially where, as in the case of Mrs. Liebeler, the person's existing body of opinions as a Commissioner indicates that personal convictions override the rule of law.

It is the very strength of her convictions that worries us. We do not wish to have judges bound by particular convictions or ideologies or by preconceived notions of how disputes should be resolved. We wish and need to have judges who are fair, open-minded, and able to mete out justice dispassionately.

It should be understood that our Bar Association is not wed to any particular political philosophy or economic ideology. Our members run the gamut across the philosophical and political spectrum: there are members who favor virtually unfettered free trade and those who are supportive of protection; there are members who represent primarily import and foreign export interests and members who represent primarily domestic manufacturers; there are Republicans, Democrats, Independents, and non-politicals; there are conservatives and liberals. The position we have taken with respect to Mrs. Liebeler's nomination here is wholly divorced from any of those political or ideological concerns. The question we have addressed is whether we, as lawyers, believe that the nominee possesses the essential qualities to be a judge of the United States Court of Appeals for the Federal Circuit.

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION
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DAVID O. ELLIOTT
PRESIDENT

December 7, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: SUSAN WITTENBERG LIEBELER
United States Court of Appeals
for the Federal Circuit

Dear Senator Biden:

We wish to correct a statement in our report of October 30, 1987, on Mrs. Liebeler. We stated (at 15) that Mrs. Liebeler issued her opinion in In the Matter of Woodworking Machines, Inv. No. 337-TA-174, after the Textron and Corning court decisions. In fact, Mrs. Liebeler's opinion was issued after the Textron decision but before the Corning decision.

We regret our earlier misstatement. However, this correction in no way alters the point we were making: i.e. Mrs. Liebeler's opinion in Woodworking conflicts with a prior judicial ruling. Therefore, our prior conclusion is unaffected by this correction.

Sincerely,

David O. Elliott

cc: Honorable Susan Wittenberg Liebeler
Honorable John Heinz

PLEASE REPLY TO:

Senator **Leahy**. Thank you, Mr. Elliott. I might mention, incidentally, that this year and for years past I have had to read all the ABA reports on nominations for district court judges and courts of appeals judges.

I wish I could say that most of their reports were done with the kind of thoroughness and clarity that you and Mr. Ikenson and the others have done. Whether the members of the committee agree or disagree with the conclusions, I think all have to agree that, as compared to what oftentimes is received on judgeships, your report is a model. I wish the ABA would follow the same model.

Mr. **Elliott**. Thank you.

Senator **Leahy**. Our next witness is Clarence Kipps, the chairman of the judicial selection committee of the Federal Circuit Bar Association. Incidentally, my own comments here will not come out of the time that has been allotted. I do not want anybody to get too nervous.

Mr. Kipps.

Mr. **Kipps**. Mr. Chairman and members of the committee, my name is Clarence Kipps and I am pleased to present the testimony of the Federal Circuit Bar Association on the confirmation of Susan Liebeler.

Senator **Thurmond**. Speak in your microphone a little louder.

Mr. **Kipps**. I am appearing on behalf of Jack Goldstein, who is the president of the Federal Circuit Bar Association and a partner in the law firm of Arnold, White & Durkee. I am chairman of the judicial selection committee of the association and a member of the law firm of Miller & Chevalier.

I have practiced before the Court of Claims for many years, and the Court of Appeals for the Federal Circuit since its creation. I was a law clerk with the Court of Claims and was actively involved in the legislation creating the Court of Appeals for the Federal Circuit.

I serve on the court's advisory committee. I have been for over 30 years actively involved in seeing that highly qualified people are appointed to the Court of Claims and now the Federal circuit.

The Federal Circuit Bar Association is a national organization with approximately 1,400 members. The members and leaders of the association come from all areas of the country and represent all areas of the court's jurisdiction.

The association was organized to unite the many different practice groups, with a view of improving the administration of justice by that court. The association provides a forum for the common concerns and dialogue between the bar and the court, government counsel and private practitioners, and litigators and corporate counsel.

Involvement in judicial selection is one of the most important functions of our association. We have carefully examined the qualifications of Susan Liebeler and found her to be well qualified for appointment to the Court of Appeals for the Federal Circuit. She possesses high ability, integrity, and judicial capacity required for this important court.

After our board had reached its decision, I reviewed additional investigative data developed by another bar association's judicial selection committee. That bar association has a genuine concern and has testified here today about Susan Liebeler.

Without disclosing names, I discussed the serious allegations with Susan Liebeler and evaluated her responses. I urged the other judicial selection committee to do likewise. My evaluation of Susan Liebeler's responses to the criticisms reconfirmed our original judgment.

She approached the allegations in a judicial manner, notwithstanding the highly personal nature of these allegations. She vigorously defended herself, but understood how some fellow Commissioners, staff and practitioners could well feel that her views on some matters were too strong.

The very nature of the Commission's work permits a wide range of discretion, gives rise to many differences of view, and calls for a great deal of judgment. She has been the only lawyer on the Commission for most of her tenure.

I have reviewed the report of the board of directors of the Customs and International Trade Bar Association and remain of the view that Susan Liebeler should be confirmed. Nevertheless, I recognize that their concern is a genuine one, and I think it is wholesome in this hearing and in our whole judicial selection process that members of the bar and bar associations who have strong convictions be given the opportunity to share those with this committee so that you can make an informed judgment.

We strongly support the confirmation of Susan Liebeler. Our bar association appreciates the opportunity of being of assistance to this committee. Thank you.

[Prepared statement follows:]

TESTIMONY OF
THE FEDERAL CIRCUIT BAR ASSOCIATION

Mr. Chairman and Members of the Committee:

My name is Clarence Kipps. I am pleased to present testimony on behalf of the Federal Circuit Bar Association on (1) the criteria to be employed in the appointment and confirmation of judges to the Court of Appeals for the Federal Circuit and (2) the qualifications of Susan Liebeler.

I am appearing in behalf of Jack Goldstein, who is President of the Federal Circuit Bar Association and a partner in the law firm of Arnold, White & Durfee. I am Chairman of the Judicial Selection Committee of the Association and a member of the law firm of Miller & Chevalier, Chartered. I have practiced before the Court of Claims for many years and the Court of Appeals for the Federal Circuit since its creation. I was a law clerk with the Court of Claims and was actively involved in the creation of the Court of Appeals for the Federal Circuit. I also serve on the Court's Advisory Committee. I have had over 30 years of interest in seeing that highly-qualified people are appointed to this Court and its predecessor, the Court of Claims.

The Federal Circuit Bar Association is a national organization with slightly over 1,400 members. The members and leaders of the Association come from all areas of the country and represent all areas of the Court's jurisdiction. The Association was organized to unite the many different practice groups with the view of improving the administration of justice. The Association provides a forum for common concerns and dialogue between Bar and Court, Government counsel and private practitioners, and litigators and corporate counsel. Periodically it sponsors regional seminars reviewing current practice in the Court.

As this Committee well knows, the Court of Appeals for the Federal Circuit is an extremely important Court with a specialized but diverse jurisdiction. In such areas as contract claims and patents, this Court has exclusive appellate jurisdiction, and its precedents are binding on many Courts, Boards, and Government Departments and Agencies. Likewise, the Court's decisions in tax, trade, civilian and military personnel and just compensation cases have enormous and far-reaching effect on the rights of citizens and the Government. The economic impact of this Court's decisions is astronomical. Thus, it is imperative that highly-qualified people be appointed as judges to serve on this Court.

For this reason, involvement in judicial selection is one of the most important functions of the Association. The charter of the Association's Judicial Selection Committee provides:

> The primary responsibility of the Judicial Selection Committee should be to create an environment which will cause the appointment of highly-qualified judges to the CAFC. Such an environment should be created through:
>
> 1. Continued education of the White House and Department of Justice officials involved in the

appointment process of the importance of the CAFC and the necessity to appoint judges commensurate with the status of this Court.

2. Timely notice to the Bar of vacancies, together with a brief description of the CAFC.

3. Evaluation of candidates and inclusion of only highly-qualified persons on a list approved by the Board of Governors of this Bar Association. The ability, integrity, and judicial capacity shall be the criteria for any judicial selection activity of this organization. Expertise in any legal speciality shall not be a prerequisite for recommendation but may be considered in assessing the ability of the candidate. This list shall be made available to the appointing officials, as well as to the Bar in general.

4. Opposing the nomination and appointment of unqualified judges to this Court.

5. Continued search for means to assure the appointment of highly-qualified judges to this Court.

6. Keeping the deliberations of the Committee and the Board of Governors in confidence.

The Federal Circuit Bar Association believes that its criteria for selection of judges should be the same as the President's criteria for nomination and this Committee's criteria for confirmation. These criteria are high ability, integrity, and judicial capacity. These criteria include objectivity and judicial temperament.

We turn now to Susan Liebeler, who is presently Chairman of the United States International Trade Commission and whose nomination for the Court of Appeals for the Federal Circuit is now before this Committee. We have carefully examined the qualifications of Susan Liebeler and found her to be well qualified for appointment to the Court of Appeals for the Federal Circuit. She possesses the high ability, integrity, and judicial capacity required for this important Court.

Susan Liebeler has exceptional intellectual capacity which is important because of the complex nature of many of the cases before this Circuit. She excelled in College and Law School and served as a clerk to the presiding justice of the California Court of Appeals. She has practiced law with law firms and in industry. She has spent a number of years as a law professor and was a consultant to the United States Price Commission, the Environmental Protection Agency, the Railway Commission, and Special Counsel for the Securities and Exchange Commission.

The President appointed Susan Liebeler to the International Trade Commission in 1984 and designated her Chairman in 1986. She, the only lawyer on the Commission for the last three years, has served with distinction and some controversy. Her views on free trade are quite pronounced and of concern to some of the practitioners before the Commission and their clients. None of her critics, however, challenge her intellectual capacity or integrity. Indeed, many of them say her talents are better suited for a Court of Appeals than for the Commission. Most of the critics use buzz words like "ideologue."

We reviewed her decisions, and discussed the criticism with her critics. More importantly, we have discussed these allegations with Susan Liebeler. My Committee, which included a prominent trade lawyer, recommended her to the Board of Governors of the Federal Circuit Bar Association. The Board interviewed Susan Liebeler and found her well qualified for appointment to the Court of Appeals for the Federal Circuit. Our Board consists of distinguished lawyers, both Government and private, who actively practice before the Court of Appeals for the Federal Circuit.

I have reviewed additional investigative data developed by another Bar Association's Judicial Selection Committee. That Committee had a genuine concern about the qualification of Susan Liebeler. Without disclosing names, I discussed these serious allegations with Susan Liebeler and evaluated her responses. I urged the other Judicial Selection Committee members to do likewise.

My evaluation of Susan Liebeler's responses to the criticism reinforced my original judgment. She approached the allegations in a judicial manner notwithstanding their personal nature. She vigorously defended herself, but understood how some fellow Commissioners, staff and practitioners could feel that her views on some matters were too strong. The very nature of the Commission's work permits a wide range of discretion, gives rise to many differences of view and calls for a great deal of judgment. She has been a lawyer on the Commission for most of her tenure.

I have reviewed the Report of the Board of Directors of the Customs and International Trade Bar Association and remain of the view that Susan Liebeler should be confirmed.

In sum, Susan Liebeler meets the high standards of the Federal Circuit Bar Association, and we strongly support her confirmation.

We appreciate the opportunity to be of assistance to this Committee and would be pleased to answer any questions. Thank you.

Senator **Leahy**. Thank you very much, Mr. Kipps.

Mr. Swecker.

Mr. **Swecker**. Mr. Chairman, members of the committee, I am appearing this morning as president of the ITC Trial Lawyers Association speaking in support of the confirmation of Susan Liebeler.

With me this morning are Tom Schaumberg, past president of our association, and Steve Lipman, who is chairman of our judicial selection committee; he is also treasurer of our association. Mr. Schaumberg is a trade lawyer. Mr. Lipman and I are both patent attorneys who also specialize in ITC practice.

The ITC Trial Lawyers Association is a non-profit association of attorneys who practice or are otherwise interested in Section 337 cases before the U.S. International Trade Commission. Founded in April 1984, the association functions under an established constitution and bylaws, publishes a monthly newsletter, and maintains an active committee system. There are currently over 350 members of the association.

The association was formed for the purpose of establishing a means of communication among the members of the bar and the Commission concerning Section 337 practice. As the workload of the Commission increased under Section 337, it became apparent that the administration of the investigations by the Commission and the effectiveness of trial lawyers representing both complainants and respondents could be made more effective by a free exchange of ideas under the sponsorship of this association.

The various committees of the association have undertaken studies of proposed legislation affecting Section 337, have proposed revisions of the Commission rules of practice, and have held formal and informal seminars regarding Section 337 practice, including the decisions of the administrative law judges, the decisions of the Commission, and the decisions of the Court of Appeals for the Federal Circuit.

The association takes an active interest in the work of the Court of Appeals for the Federal Circuit, since this is the appellate court for decisions of the International Trade Commission.

Further, in view of the fact that many of the members of our association are patent attorneys and that appeals of patent cases from the Federal district courts are heard only by the Court of Appeals for the Federal Circuit, the decisions of that Court are of special interest to that segment of our membership.

In view of the importance of the Court of Appeals for the Federal Circuit to our members, the association has taken a position that candidates for judgeships on the Federal circuit should bring to the court expertise in intellectual property and trade law and should be evaluated further on general judicial qualifications.

The members of our association have had the opportunity over the last several years to observe and evaluate the performance of Chairman Liebeler both as a member of the Commission and later as Chairman.

While individual members may disagree with particular decisions of the Commission, that is to be expected. Nevertheless, the ITC Trial Lawyers Association is pleased to lend its endorsement to the nomination of ITC Chairman Susan Liebeler because of her expertise in trade law to serve as a judge of the Court of Appeals for the Federal Circuit.

Thank you.

[Prepared statement follows:]

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STEPHEN L. SULZER
ALLEN S. MELSER
STEVEN H. NOLL
(Term expires - 1988)

November 2, 1987

Committee on the Judiciary
United States Senate

STATEMENT OF ROBERT S. SWECKER, PRESIDENT, ITC TRIAL LAWYERS ASSOCIATION, IN SUPPORT OF SUSAN LIEBELER

The ITC Trial Lawyers Association is a non-profit association of attorneys who practice or are otherwise interested in Section 337 cases before the U.S. International Trade Commission. Founded in April 1984, the Association functions under an established constitution and by-laws, publishes a monthly newsletter and maintains an active committee system. There are currently over 350 members of the Association.

The Association was formed for the purpose of establishing a means of communication among the members of the Bar and at the Commission concerning Section 337 practice. As the workload of the Commission increased under Section 337, it became apparent that the administration of the investigations by the Commission and the effectiveness of trial lawyers representing both complainants and respondents could be made more effective by a free exchange of ideas under the sponsorship of this Association.

The various committees of the Association have undertaken studies of proposed legislation affecting Section 337, have proposed revisions of the Commission rules of practice, and have held formal and informal seminars regarding Section 337 practice, including decisions of the Administrative Law Judges, the Commission, and the Court of Appeals for the Federal Circuit.

The Association takes an active interest in the work of the Court of Appeals for the Federal Circuit, since this is the appellate court for decisions of the International Trade Commission. Further, in view of the fact that many of the members of our Association are patent attorneys, and appeals of patent cases from the federal district courts are heard only by the Court of Appeals for the Federal Circuit, the decisions of that court are of special interest to that segment of our membership.

In view of the importance of the Court of Appeals for the Federal Circuit to our members, the Association has taken a position that candidates for judgeships on the federal circuit should bring to the court expertise in intellectual property and trade law, and should be evaluated further on general judicial qualifications. The members of our Association have had the opportunity over the last several years to observe and evaluate the performance of Chairman Liebeler, both as a member of the Commission, and later as Chairman. While individual members may disagree with particular decisions of the Commission, that is to be expected. Nevertheless, the ITC Trial Lawyers Association is pleased to lend its endorsement to the nomination of ITC Chairman Susan Liebeler, because of her expertise in trade law, to serve as a judge of the Court of Appeals for the Federal Circuit.

Senator **Leahy**. Thank you very much, gentlemen. Let me go into a number of questions, and I will ask each one of you the same questions because they reflect partly on how you put together your reports, although obviously you reached different results.

I want to go into the trade law background of the members of your organizations' judicial selection committees, specifically what proportion of your committees' membership consists of practitioners before the International Trade Commission.

So, Mr. Elliott, could we start with you? What proportion of your committee's membership consists of practitioners before the ITC?

Mr. **Elliott**. Of the committee or of the association?

Senator **Leahy**. Of the association?

Mr. **Elliott**. Of the association, I would say that the vast majority of them. The members of our association for the most part are those who are predominantly engaged in customs and trade law, and in this day and age those are so related that I would be hard-pressed to say that there is a practice that is so limited that it is only in, let us say, in the customs area and never gets into the trade area.

So I would say the vast majority have a practice before the Commission.

Senator **Leahy**. Thank you.

Mr. Kipps?

Mr. **Kipps**. I do not know how many members of our association are trade or customs lawyers. We did have a prominent trade lawyer on our judicial selection committee, and our approach to evaluating a candidate has very little, under our charter, to do with the expertise in the area. We are looking at the overall quality in the person.

Senator **Leahy**. I understand, but your answer to my question, though, is relatively few, is that it?

Mr. **Kipps**. We had one out of six judicial selection committee members was a trade lawyer.

Senator **Leahy**. And your association?

Mr. **Kipps**. Of 1,400 people, I have not the slightest idea how many of them. The largest jurisdiction is not trade; it is a very small part of that court's jurisdiction.

Senator **Leahy**. Mr. Swecker?

Mr. **Swecker**. Virtually all of our members practice before the ITC.

Senator **Leahy**. Are they specialized mostly in Section 337 cases?

Mr. **Swecker**. Yes, although the trade lawyers who are members of our association also practice in the other areas of the ITC.

Senator **Leahy**. Would you say that most of the trade lawyers in your organization are representing domestic interests or import interests, or both?

Mr. **Swecker**. I would say both, both sides.

Senator **Leahy**. Mr. Elliott?

Mr. **Elliott**. Most of the representation of our members, I would say, would probably be import interests, although there is a large domestic industry representation in terms of the members of our association.

Senator **Leahy**. Mr. Elliott, I am just trying to figure out how you went about conducting or preparing this report. Mr. Kipps, again, describes some of the things they looked for, and we will go back to that, but we will take you first.

Did you conduct interviews?

Mr. **Elliott**. Yes. Our judicial selection committee is charged with the responsibility for evaluating all nominees to both the Federal Circuit Court and to the Court of International Trade, and we have been doing it for a number of years.

And in discharging that responsibility, it is the task of the committee to interview both those that—depending on who the candidate is, of course, and the nominee is, those that work and have professional contact with that nominee. So the interview was very much a part of our committee's work.

That was your question, the interview, or——

Senator **Leahy**. Yes.

Mr. **Elliott**. Yes.

Senator **Leahy**. Do you know how many interviews were conducted?

Mr. **Elliott**. How many interviews?

Senator **Leahy**. Or does Mr. Ikenson know?

Mr. **Elliott**. Mr. Ikenson is the chairman of our committee and he——

Mr. **Ikenson**. In toto, I would say there were between 30 and 40 interviews, and there were perhaps more casual conversations which may not rise to the dignity of a formal interview.

Senator **Leahy**. But 30 to 40 formal interviews?

Mr. **Ikenson**. Yes.

Senator **Leahy**. Did you review Commissioner Liebeler's decisions on the ITC?

Mr. **Ikenson**. We in the judicial selection committee reviewed her decisions, as did the much larger board of directors.

Senator **Leahy**. And did you prepare and circulate a report before anything came up here to us?

Mr. **Ikenson**. Yes, Senator. A report was prepared and circulated among all members of the board of directors.

Senator **Leahy**. Mr. Kipps, did you conduct interviews?

Mr. **Kipps**. Yes, we did, Mr. Chairman.

Senator **Leahy**. And approximately how many, would you say?

Mr. **Kipps**. I do not really know. The members of our committee—we had a trade lawyer on our committee and he knew the bar. My law firm has a trade practice, both import and domestic, and I discussed the background and the criticisms that we had heard with them.

We interviewed Chairman Liebeler early on in our investigation. We brought up with her some of these criticisms and I had never met her before that time.

Senator **Leahy**. I see.

Mr. **Kipps**. And she responded in what we thought was a good way. Later, after our board of directors interviewed her, interviewed Chairman Liebeler, and then after our bar association made its decision, I was told of some additional investigative data and met with the committee, or members of the committee of the other bar association, and we reviewed that data.

And, again, I urged that bar at that time to talk to her. I did talk to her and I confronted her with the questions, not naming any names and not disclosing who was making the allegations, because I am interested in high-quality people and I want intellectual honesty on that court, and I want integrity.

And I satisfied myself from talking with her, and if I had not, I would have gone back to my board of governors and we would have changed our report. I am satisfied that she possesses all of those ingredients, and that is why I am here today supporting her.

Senator LEAHY. Other than the interviews of Commissioner Liebeler, you do not know how many interviews were made?

Mr. KIPPS. I really do not because different members made different interviews.

Senator LEAHY. Did you review her decisions on the ITC?

Mr. KIPPS. The trade lawyer did, and the lawyers in my office are already familiar with them and her position on free trade was not a new matter. I mean, people were ready to talk about that very early on in the game as soon as her name came up.

Senator LEAHY. Did you prepare and circulate a report?

Mr. KIPPS. We made an oral report.

Senator LEAHY. I see.

Mr. Swecker, did you conduct interviews?

Mr. SWECKER. I would like to ask Mr. Lipman, who is chairman of our judicial selection committee, to report on that.

Senator LEAHY. Of course.

Mr. LIPMAN. Senator, there was no actual interview of Commissioner Liebeler. In the case of Judge Mayer, who has been confirmed to the Federal circuit, there was a personal interview, but there was not sufficient time for my committee to interview Commissioner Liebeler.

Senator LEAHY. Did you interview other people?

Mr. LIPMAN. No, we did not, Senator. However, the six members of my committee all have extensive experience before the Commission during Judge Liebeler's tenure and although the decisions and opinions authored by Judge Liebeler were not actually read by the committee members as part of our committee work, they were quite familiar to the six members of my committee.

As a result, a poll of the committee members was taken and a draft letter was prepared and circulated. This was a draft letter to Attorney General Meese. This letter was circulated initially among the committee members and presented subsequently to the board of directors of the association.

The board of directors voted on not only the actual recommendation of the committee regarding Chairman Liebeler, but also on the wording of the draft letter to Attorney General Meese. After input from the full board, the draft letter was amended and forwarded to Attorney General Meese.

Senator LEAHY. And did the whole board vote unanimously on it?

Mr. LIPMAN. I do not believe it was unanimous, Mr. Leahy.

Senator LEAHY. Do you remember how the split was?

Mr. LIPMAN. No, I do not, but it was—I think there were one or two board members not in favor of the recommendation, but I do not recall the exact number.

Senator LEAHY. Out of how many?

Mr. LIPMAN. Out of approximately one dozen.

Senator LEAHY. And you felt that for the six of you it was enough to discuss it among yourselves and not have interviews with other practitioners or other Commissioners or other people who worked at the Commission?

Mr. LIPMAN. That is correct, Senator, especially in view of the time frame of Chairman Liebeler's initial nomination and scheduling—as we understood it at the time, her name was being forwarded post haste to the White House, and that is why the letter from the board went to Attorney General Meese.

Perhaps if we had a different set of time circumstances, we might have conducted further interviews, but we did not.

Senator LEAHY. If more time had been available, would you feel more comfortable if you had a chance to go out and discuss it with a wider range of people?

Mr. LIPMAN. No, Senator, I do not believe so.

Senator LEAHY. Let me make sure I fully understand this. Mr. Kipps, you said you had talked a couple times with Ms. Liebeler. Did you interview any other Commissioners or Commission staff?

Mr. KIPPS. No. I have talked to them on the phone, but I have not interviewed them.

Senator LEAHY. I understand.

Mr. Swecker, we covered that. Mr. Elliott or Mr. Ikenson, either one, did you discuss this nomination with some of the other Commissioners?

Mr. IKENSON. We interviewed every sitting Commissioner, including at least one past Commissioner.

Senator LEAHY. Any Commission staff?

Mr. IKENSON. We interviewed—yes—numerous members of past and present Commission staff.

Senator LEAHY. Now, Mr. Kipps, as I read your statement, you characterize the views of some of Ms. Liebeler's critics as follows, and I quote, "Many of them say her talents are better suited for a court of appeals than for the Commission."

I have not really been hearing that, so I was just curious what you meant.

Mr. KIPPS. One of my law partners said that, Senator, and I cannot—that is not a single comment, but I do know that one of my own law partners thought that her intellectual capacity and her approach to analyzing cases particularly lent itself to this court's jurisdiction.

Senator LEAHY. I still do not understand. Is that saying that she is better suited for the lifetime appointment?

Mr. KIPPS. No, I did not say that, Senator. I certainly did not imply that and I did not mean to. It was just the observation of one of my law partners in response to a question of mine that did come up within the last couple of days.

I went back to him and pursued him on whether he still thought that she ought to be appointed and that is when the remark was made by him.

Senator LEAHY. Now, you say there are many differences of views on trade law matters, and I think we would all agree with that. The customs bar makes a similar statement. But they go on to conclude that Ms. Liebeler "reads into the statute something which cannot be found in its text." They, in effect, say that she has read her own personal views into the statute.

Now, you have read their report and you obviously reject that criticism. Do you conclude that Ms. Liebeler has interpreted the laws on dumping and countervailing duties in accordance with the congressional intent?

Mr. Kipps. Senator, I am not an expert in that area, but I did read her cases and I did talk to her about them, and I did talk to some members of my firm on questions that I ought to ask her to see whether indeed she was going beyond the statute. And her answers seemed to me, as not an expert in the area, to be in accordance with what she said here today.

Senator Leahy. One of the questions we are going to have to ask ourselves, of course, is whether she has substituted her own views for the intent of Congress in interpreting the trade laws. We have not reached that question, I would hasten to add.

But suppose that conclusion were reached; then would she be suitable? If you were to reach that conclusion, would you feel that she was suitable? You have obviously reached the conclusion that she is suitable to serve on the court, but if you were to reach the conclusion that she had substituted her own views for the intent of Congress in interpreting the trade laws, would you reach the same conclusion on her suitability?

Mr. Kipps. No, I would not.

Senator Leahy. In fact, under those circumstances such a person would not be suitable, is that correct?

Mr. Kipps. Well, I would think that would be intellectual dishonesty and, really, substituting her own views for what she knew was the intent of Congress. I would be opposing her, not supporting her.

Senator Leahy. Now, Mr. Swecker, I had asked about your organization and the predominance of Section 337 cases. Let me ask you about the part of the customs bar report which said, "Ms. Liebeler's opinions in this area"—and I am talking about the Section 337 area—"indicate that she does not acknowledge the supremacy of the statute and court decisions over her private views."

Do you believe that her reading of the injury requirement in current law is a defensible reading of the statute in light of the precedent on this point?

Mr. Swecker. I believe she follows the statute as it is written. I believe in reviewing the sum total of the cases decided by the Commission on the injury question in 337 cases, you will find that it goes all over the place, and I think selecting one or two cases to focus attention on probably does not give you a realistic impression.

I personally was not involved in the *Corning* case, optical wave guide fibers, or the Aramid fibers, and I would rather not comment on the determination of injury because so much of that is based upon the factual record, which in most cases is confidential.

Senator Leahy. We had a hearing on this nomination on August 6th. Did your report follow up in any way on any of the questions raised in that August 6th hearing?

Mr. Swecker. No, we did not.

Senator Leahy. Mr. Kipps?

Mr. KIPPS. Not per se. We did talk with Susan Liebeler about some of the criminal charges to ascertain a little bit more about them. We had raised that with her when—she gave us a copy at our request of her response to the ABA report, and it was mentioned in that report and so we asked her about it.

Senator LEAHY. Mr. Elliott had said earlier that he talked with the former attorney general of the State of Vermont about that, the man who had been prosecuting attorney at the time. Did you talk with him or any of the people in Vermont involved with it?

Mr. KIPPS. No, we did not.

Senator LEAHY. Senator Thurmond, would you like to ask any questions?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Kipps, in an April 1st, 1987, letter to Chairman Biden, the Federal Circuit Bar Association found that Ms. Liebeler was well qualified for appointment to the Court of Appeals for the Federal Circuit.

Would you tell the committee how your bar association reached this determination very briefly regarding Ms. Liebeler's nomination?

Mr. KIPPS. Upon her nomination, Senator Thurmond, we started collecting some of her decisions and some of the criticisms of her and my committee reviewed those. And after doing that, we then interviewed Susan Liebeler in her office for maybe an hour, an hour-and-a-half.

We then proceeded to talk with other members of the bar who were expert in the trade and customs law area, and we then asked her—and I talked with members of my own firm, as I say, who practice before the Commission and are familiar in both areas.

And we then met with the board and suggested that we invite Susan Liebeler over to meet each member of the board and have them ask her as many questions as they wanted to before we voted on her, and we did that and the board voted.

That is how we made the original determination, and it was largely based upon her conceded intellectual capacity. I mean, everyone concedes that she is exceptionally talented, and we are looking for exceptionally talented persons for that court.

Secondly, she is a very strong individual. She has a lot of courage of her convictions, and we are looking for people for that court that have that kind of a quality. We have some very strong-minded folks on there already, but we also have some passive ones, and it is the kind of court that needs a strong person with intellectual capacity.

We also were satisfied that she had what is very important to us, and that is intellectual honesty. When she sees—she is smart enough to see what the issues are, and when she sees them she then addresses them and she does it in an intellectually honest way.

And we were satisfied that she met those criteria and that is why we recommended that she was well qualified. We would like to have had a little bit more trial experience than what she had. But, nevertheless, the other qualities were so outstanding that we made the recommendation that we did.

Senator THURMOND. Mr. Kipps, during the course of your association's investigation into Ms. Liebeler's nomination, did you discuss with her any of the criticisms you had received and, if so, what did your evaluation of these matters reveal about Ms. Liebeler?

Mr. KIPPS. Senator, it concerned me greatly when I found a fellow bar association was concerned and thinking about opposing her nomination, and I did——

Senator THURMOND. When you found what?

Mr. KIPPS. When I found that a fellow bar association was considering opposing her confirmation. And I did talk with members of the committee and I did take those criticisms without mentioning what bar or what individuals raised them, but they were serious allegations and if they were true, then it meant that we should do—our own bar should do something about it.

And I talked to her about it. I went down and I met with her and I have talked to her about it several times and I am satisfied that the criticisms, while genuine, they are unfounded.

Senator THURMOND. They are what?

Mr. KIPPS. They are unfounded.

Senator THURMOND. Unfounded?

Mr. KIPPS. The conclusion they reached——

Senator THURMOND. You found that the criticisms about her were unfounded?

Mr. KIPPS. That is right.

Senator THURMOND. Now, Mr. Kipps, in your opinion, does Ms. Liebeler have the integrity, judicial temperament, and the professional competency to serve as a member of the Federal circuit?

Mr. KIPPS. I certainly do, Senator.

Senator THURMOND. Now, Mr. Kipps, is there any reason why you would be favorable to her other than just to give an unbiased recommendation to us?

Mr. KIPPS. Absolutely not. I have—I never met Chairman Liebeler before we interviewed her and my sole concern and my committee and my bar association's concern is that we appoint—we see that the best people available are appointed to that bench, and to oppose those who are not.

And I may very well be sitting down at the other end of the table the next time you hear from our bar association because sometimes the folks that are looked at by any administration do not quite measure up to our standards, and that is the reason why we have taken an active role not only in this administration, but we did in the Carter administration and the one preceding. And I feel that we have upgraded the quality of people that are appointed to this very important court.

Senator THURMOND. And you feel that they should be scrutinized carefully, and you feel that that is what you did in this case?

Mr. KIPPS. Yes, sir.

Senator THURMOND. And you are satisfied that she is qualified to serve on that court?

Mr. KIPPS. Absolutely.

Senator THURMOND. By reason of her integrity, judicial temperament and professional competency?

Mr. KIPPS. Yes, Senator.

Senator **Thurmond**. I think that is all the questions I have for you, Mr. Kipps. I might say to just bring this out for the record, you are chairman of the judicial selection committee for the Federal Circuit Bar Association, I believe.

Mr. **Kipps**. That is correct.

Senator **Thurmond**. And how many members has your organization?

Mr. **Kipps**. Fourteen hundred members of the bar association.

Senator **Thurmond**. Fourteen hundred.

Mr. **Kipps**. And we represent the entire area of that court's jurisdiction, which is predominantly patent, tax, government contracts. It represents probably 80-plus percent of its jurisdiction.

Senator **Thurmond**. You what, now?

Mr. **Kipps**. I say we represent the patent—our bar association represents the patent, government contracts, tax areas of jurisdiction, which constitute more than 80 percent of the workload of that court.

We have a very strong interest in seeing that good people are appointed, and I do not want any notion that we were lax or carefree in approaching our assignment. That is the court in which many of us practice.

Senator **Thurmond**. Why do you think some of them had some criticism about her, such as Mr. Elliott?

Mr. **Kipps**. I really do not know. That area of practice is foreign to me. I do know that there is a great deal of discretion involved in the decisionmaking process there. I understand she has been the only lawyer there on the Commission for the last 3 years, and she does have a style, an organizational style of getting things set up and analyzed in a way that apparently had not been done there before.

And there are people that do not like some of the things that she is doing, but I cannot find—and I indeed had pressed some of the critics: Do you think she is intellectually dishonest? If you think so, tell me, and tell me why and give me examples. And I got none.

Senator **Thurmond**. Now, Mr. Swecker, would you please tell the committee the number of attorneys who are members of your bar association, and that is the ITC Trial Lawyers Association, and do the members of your association regularly appear before the International Trade Commission?

Mr. **Swecker**. Yes, Senator. We have 350 members, approximately. Virtually all of our members appear regularly before the Commission—representing either complainants or respondents.

Senator **Thurmond**. Now, Mr. Swecker, what has been your association's overall impression of Ms. Liebeler's ability during her tenure on the ITC?

Mr. **Swecker**. Our impression, as reflected in the statement which I read, is that she is qualified for the position, that she has the judicial temperament which we believe is essential to that position. She has the intellectual ability to analyze the very difficult issues, particularly intellectual property and trade issues which are both difficult, on that court.

And it is the very important interest of our association and our members that we have the best qualified people on that court, and we have endorsed her on that basis.

Senator THURMOND. You interviewed her, or your committee interviewed her?

Mr. SWECKER. Although she was not interviewed specifically for this position, our association has sought participation by all of the Commissioners in our seminars and in our continuing legal education programs.

During those occasions our members had a unique opportunity to discuss particular issues with the Commissioners, with the staff attorneys and among ourselves, and in that way we believe that we have a very good knowledge of all of the Commissioners' views and approaches to deciding these cases, and particularly in the case of Chairman Liebeler.

Senator THURMOND. Do you know of any reason why this committee should refuse her confirmation?

Mr. SWECKER. No.

Senator THURMOND. She is a lady of integrity?

Mr. SWECKER. Yes, certainly.

Senator THURMOND. A lady of judicial temperament?

Mr. SWECKER. Yes.

Senator THURMOND. A lady of professional competence?

Mr. SWECKER. Yes.

Senator THURMOND. Well, what is against her? Who is against her, except Mr. Elliott's organization? Is there anybody else against her?

Mr. SWECKER. Not that I am aware of. I will have to be perfectly candid with you that not every one of the 350 members of our association heartily endorses her nomination, but that is only to be expected when you have that many people. Certainly, the majority of our members support her and believe she would do a good job in this position, but I know of no other opposition.

Senator THURMOND. Would you say a large majority of your members approve of her?

Mr. SWECKER. I believe so, yes.

Senator THURMOND. Mr. Elliott, I want to ask you a question. Now, just why are you against her?

Mr. ELLIOTT. Well, Senator——

Senator THURMOND. In short terms now. Do not give us a talk; just come to the point.

Mr. ELLIOTT. Fine. Intellectual capacity, we do not question. Integrity, we do not question.

Senator THURMOND. You what?

Mr. ELLIOTT. We do not question——

Senator THURMOND. You do not question her intellectual abilities?

Mr. ELLIOTT. That is correct, Senator.

Senator THURMOND. You do not question her integrity?

Mr. ELLIOTT. That is correct, Senator.

Senator THURMOND. Well, then, what do you question?

Mr. ELLIOTT. Well, we question her temperament to sit on the bench, and we do that for a twofold reason. In order to investigate someone's temperament, one of the most logical sources would be those people with whom the nominee has worked as a colleague or has worked in charge of, and we went to those sources, which the other bar associations did not.

So to comment on temperament, it seems to me very relevant that you check the nominee's background in terms of fellow colleagues, professional workers, and we did that all the way from the Commission back to law school. So temperament comes through when you investigate those that know something about the nominee much more than you would.

It also comes through in writings and opinions and, in our opinion, as professional lawyers in this area, Ms. Liebeler has demonstrated an ability to reach her results by preconceived notions and reasoning that follows from those notions rather than statutory interpretation.

I will comment that, as I answered Senator Leahy, probably a good majority of our members benefit from the results that Ms. Liebeler reaches. What we question is the method, the restraint, and the recognition that the law is what governs the decision, not independent, preconceived notions.

Senator THURMOND. Now, your association has how many members?

Mr. ELLIOTT. Three hundred; in that area, Senator.

Senator THURMOND. Now, Mr. Kipps' association has 1,400 members; that is the Federal Circuit Bar Association.

Mr. ELLIOTT. I am one of them.

Senator THURMOND. And Mr. Swecker's association, ITC Trial Lawyers, has 350. That is 1,750 lawyers in those two. Now, you are representing an association with 300 that is opposing her.

Mr. ELLIOTT. That is right, Senator.

Senator THURMOND. That is a minority, is it not?

Mr. ELLIOTT. When you add it up that way, any time the ABA comes out for someone, we might as well not show up because they have quite a few more than we do. But I do not think it is the numbers and I do not think we really think that each member——

Senator THURMOND. I was really more or less kidding on that.

Mr. ELLIOTT. All right. [Laughter.]

Senator THURMOND. At the same time——

Senator LEAHY. You have just got such a pixie sense of humor, as I have said before, Senator Thurmond. [Laughter.]

Senator THURMOND. Now, in your report you stated that a substantial majority of your board of directors found Ms. Liebeler not qualified, while a minority found her to be qualified. How was the vote on that?

Mr. ELLIOTT. Eleven to one.

Senator THURMOND. Eleven to one. Most of them thought like you did?

Mr. ELLIOTT. Yes.

Senator THURMOND. Now, what are the standards your association uses in evaluating judicial nominations, and are these standards set forth in the charter or bylaws of your association? If so, would you please provide the committee with a copy of these standards?

Mr. ELLIOTT. We certainly will, Senator, and we apply the same standards of the ABA; that is, competence, integrity, and judicial temperament.

Senator THURMOND. I believe the American Bar Association found her qualified, did they not?

Mr. ELLIOTT. I believe they did.

Senator THURMOND. Well, three bar associations found her qualified, but yours did not.

Mr. ELLIOTT. Yes. If I may comment, I would hope that numbers alone, again, unless you are kidding me——

Senator THURMOND. I understand. You have a right——

Mr. ELLIOTT. Three to one—I would ask that you evaluate the information developed by those bars in order to reach your conclusion.

Senator THURMOND. I understand, but it is rather convincing, is it not, that the American Bar Association, which is the biggest in the whole Nation, the biggest in the world, I guess, and the Federal Circuit Bar Association and the ITC Trial Lawyers all found her qualified?

Mr. ELLIOTT. Having worked in the area of judicial selection before Mr. Ikenson, and having exchanged views with the American Bar, whether it is the second circuit when it is a CIT nominee or down here, it does not surprise me at all.

Senator THURMOND. I suppose if lawyers did not disagree, they would hardly make a living. So I guess there is a difference of opinion.

Mr. ELLIOTT. That is true.

Senator THURMOND. Now, did you discuss with Ms. Liebeler any criticisms that you had received about her and asked her to answer them?

Mr. ELLIOTT. For that, I will turn to our chairman.

Mr. IKENSON. I did not hear the end of your question, Senator Thurmond.

Senator THURMOND. Did you discuss with her any criticisms about her that you had heard and give her a chance to answer them?

Mr. IKENSON. We did not discuss specific criticisms that arose. We did suggest to her that she was a controversial nominee and she then took the occasion to explain why she believed she was acting always within the letter and spirit of the law.

Senator THURMOND. Most people who stand for anything are a little controversial anyway, are they not?

Mr. IKENSON. My experience as chairman of this committee takes me to two previous nominations, neither of which was controversial, and in each instance our bar supported the candidates without any hesitancy, Senator.

Senator THURMOND. Sometimes they do not bring it out because they decide that they will be confirmed anyway or they decide that it is not sufficient to go into. If anybody really takes a position here in this Senate—you take the question of abortion; it does not matter which way you go. You have got pro and con. On the question of school prayer, you have got pro and con, and I could go on and mention a dozen subjects like that.

But the majority controls. The majority here seems to be strongly in favor of her from the bar associations that have examined her, and so forth. As I understand it, the only criticism you have of her is you feel her temperament may not be suitable for this position.

Mr. **Elliott**. Yes, Senator, the temperament as reflected in the opinions and——

Senator **Thurmond**. In what?

Mr. **Elliott**. Opinions and evaluations of those who know her well and in her written opinions. We translate that into temperament, although it is very crucial in terms of someone aspiring to a Federal court to fit that temperament in terms of being constrained by the law of Congress in reaching decisions.

Senator **Thurmond**. Now, when you say those who know her well, these people know her about as well as you do, do they not?

Mr. **Elliott**. No. I meant the interviewees. We have documented the type of interviewees, her colleagues at the Commission, Commission staff, Loyola Law School, practitioners. Those are the interviewees.

Senator **Thurmond**. I do not guess you will ever get anybody who will suit everybody.

Mr. **Elliott**. I am sure that is true.

Senator **Thurmond**. After all, the President has the right to make these appointments and unless there is some serious objection, they should be confirmed.

Now, as I understand it, several of these have been put in the record.

Senator **Leahy**. Excuse me. I do not want to cut you off, and I am not going to. My plan was to recess at 12:00, with an absolute drop time of 12:15. Whatever we do not complete today, we will reschedule for Friday, the 13th. We have some hearings that day and we will put it on at the beginning of those.

Senator **Thurmond**. Unless you have got some more, I am through.

Senator **Leahy**. I have got some more.

Senator **Thurmond**. You are not through?

Senator **Leahy**. We will just have to do it at that time. I do not want to cut you off on your last question. Go ahead.

Senator **Thurmond**. I understand, but you are going to have a third hearing on this?

Senator **Leahy**. Well, I think Ms. Liebeler wants to be able to testify and she ought to, out of fairness, have a chance to respond to what has been said here today.

Ms. **Liebeler**. I would be glad to respond in writing, Senator.

Senator **Thurmond**. Now, I want to say this now. I think it is unfair to this lady to have another third hearing. We ought to get through these things. There is no use carrying on forever. I think we ought to stay here today and finish it, if necessary. I have got other appointments, too.

Senator **Leahy**. Fine. We can come back at 8:30 this evening. We can clear it at that time. I agree with Senator Thurmond. If you wish to come back at that time, we will be back here at 8:30 this evening.

Senator **Thurmond**. We will come back at 8:30, then, this evening.

I want to just announce this for the record, that I believe four endorsements have gone in the record from Ambassador John Shad, Embassy of the United States at The Hague; Dean Monroe E. Price, Benjamin Cardozo School of Law in New York; Dean Travis

Lewin, Interim Dean, Syracuse University; Professor Alan Sykes, University of Chicago Law School.

And then these additional ones, I do not believe have been mentioned: Mr. Pierre F. de Ravel D'Esclapen, New York; Theo A. Bruinsma, former Dean, Loyola Law School; Fred S. McChesney, visiting professor, University of Chicago Law School; John T. McDermott, professor at Loyola Law School; Loren R. Rothschild, American Protection Industries, Los Angeles; David C. Tunick, professor, Loyola School of Law; Diane P. Wood, assistant professor, University of Chicago.

Mr. Chairman, I ask that they be put in the record.

Senator LEAHY. Of course.

[See appendix.]

Senator LEAHY. I have also stated in the record that if there are any other letters in favor of Ms. Liebeler, naturally, they will be put in the record, if they have not already.

Senator THURMOND. So we will come back at 8:30.

Senator LEAHY. Mr. Elliott, there is one thing. Your bar is made up predominantly of people who are actually going to be practicing in the court to which we are referring?

Mr. ELLIOTT. That is correct, Senator.

Senator LEAHY. Okay. Now, I have no further questions of this panel.

Ms. Liebeler, I promised you that you would have an opportunity to respond. If you would like to come back this evening or on the morning of Friday, the 13th, it is entirely up to you. It is your decision.

Ms. LIEBELER. Senator, I am very pleased to respond in writing if you would prefer.

Senator LEAHY. I do not want in any way to cut off your opportunity; I want to make it very clear.

Ms. LIEBELER. If that is all right with Senator Thurmond, I will respond in writing.

Senator LEAHY. That is acceptable.

Ms. LIEBELER. Is that all right, Senator Thurmond?

Senator THURMOND. Respond in writing?

Ms. LIEBELER. Yes. If you prefer me to testify, I will, Senator.

Senator LEAHY. I want to make sure she has an opportunity to respond the way she wishes to.

Senator THURMOND. Well, that would be all right, provided we just do not put this thing over. I would like to get action.

Senator LEAHY. I will note in the future at the beginning of each hearing how late it will go, so that everybody can be assured of that time. I just do not want any witness for or against a nominee or any nominee ever to be cut off, and I would hope that Senator Thurmond is not suggesting that I would.

Senator THURMOND. I am not suggesting that.

Senator LEAHY. We will always have enough time to do it. If we are going to get these hearings through, we are going to have to set not only a beginning, but an ending time. If we do not end in that time, any Senator for or against a nominee, of course, will have the right to have them come back further.

No Senator will have their questions cut off on either side of the aisle, and I think the Senator knows that that has always been my route.

Senator **THURMOND**. Mr. Chairman, I have always found you very fair and I want the record to show that. I want to say, however, that this nomination has been here since March.

Senator **LEAHY**. I understand that; that is why I want to get it finished.

Senator **THURMOND**. And this is now November, and I think it is inexcusable that we do not act on these things one way or the other, either approve them or disapprove them. All I am asking is can you respond right away in writing, Ms. Liebeler?

Ms. **LIEBELER**. Senator, I would be pleased to.

Senator **THURMOND**. What is the day of the month? Today is the 3rd, is it not? Could you respond in a week so we can get this matter——

Ms. **LIEBELER**. Oh, Senator, I will be pleased to respond before that.

Senator **THURMOND**. I am sure the chairman will get it on the list for consideration by the committee.

Ms. **LIEBELER**. Okay. I will try to respond within the next day or two, Senator.

Senator **LEAHY**. Well, you take the amount of time you want.

Senator **THURMOND**. Well, I do not want you to take a lot of time. I want you to answer right away. [Laughter.]

Ms. **LIEBELER**. I appreciate Senator Leahy's fairness.

Senator **LEAHY**. You and Senator Thurmond do whatever you want to do

Ms. **LIEBELER**. Thank you.

Senator **LEAHY**. We will stand in recess.

Senator **THURMOND**. I have found him fair and I am sure he will get it on the agenda for action soon. Thank you very much.

[Whereupon, at 12:23 p.m., the committee was adjourned.]

APPENDIX

RECEIVED APR 14 1987

Susan Wittenberg Liebeler
United States Senate
Committee on the Judiciary
Questionnaire for Judicial Nominees

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

My name is Susan Liebeler. I practiced law under my former married name, Susan Wittenberg. Prior to 1963 I used my maiden name, Susan Kay Levine.

2. Address: List current place of residence and office address(es).

Residence: 2031 Franklin Cluster Court,
Falls Church, Virginia 22043

Office: 701 E Street, NW, Room 203,
Washington, DC 20036

3. Date and place of birth.

I was born in New Castle, Pennsylvania on July 3, 1942.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

I am married to Wesley James Liebeler. My spouse is a professor of Law at UCLA Law School, 405 Hilgard Ave., Los Angeles, California 90024.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Michigan
Ann Arbor, Michigan
1960-1963 BA 1963

Harvard University
Cambridge, Massachusetts
Summers 1961 and 1962 no degree

University of Michigan Law School
Ann Arbor, Michigan
1963-1964 no degree-transferred to UCLA

UCLA Law School
405 Hilgard
Los Angeles, California 90024 LL.B. 1966
(1964-1966)

6. Employment Record: List (by year) all business or other professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

9/66-9/67

Judicial Clerk
Hon. Gordon Files
Presiding Justice
California Court of Appeals
Second Appellate District, Division Five
Los Angeles, California

9/67-4/68

Associate
Gang, Tyre & Brown
6400 Sunset Boulevard
Los Angeles, California 90028

4/68-6/70

Associate
Greenberg, Bernhard, Weiss & Karma
1880 Century Park East
Los Angeles, California 90067

6/70-6/71

Associate General Counsel
Republic Corp.
1900 Avenue of the Stars
Los Angeles, California 90067

Summer 1971 to Summer 1972

John Burgess, Esq.
50 Western Avenue
Brattleboro, Vermont 05301
802/254-2353

From September 15, 1971 to March 15, 1972 I completed six months of registered law study in conformity with the State of Vermont Board of Bar Examiner's Rules 1.6 and 5.2, Part II in order to be admitted to practice in Vermont. Thereafter, I worked for Mr. Burgess on an hourly basis.

9/72-12/72

During this period I handled indigent appeals for the California Court of Appeals.

1/73-5/74

General Counsel (1/73-8/73)
Consultant (8/73-5/74)
Verit Industries
9300 Wilshire Boulevard
Beverly Hills, California

8/73-1984

Professor of Law
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015

On several occasions while on leave of absence from Loyola Law School I served as a consultant, special counsel or visiting professor:

1972
Consultant to the General Counsel
United States Price Commission
Washington, DC

9/74-12/74
Lawyer, Consultant
United States Environmental Protection Agency
Washington, DC

1/75-8/75
Consultant to the General Counsel
United States Railway Commission
Washington, DC

8/81-6/82
Special Counsel to Chairman John S.R. Shad
Securities and Exchange Commission
Washington, DC

6/82-8/82
Visiting Professor
University of Texas Law Schoc
Austin, Texas

4/84-present

Commissioner
Vice Chairman (6/84-6/86)
Chairman (6/86-present)
United States International Trade Commission
701 E Street NW
Washington, DC 20436

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I have not had any military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Senior Editor, UCLA Law Review
Stein Scholar, UCLA Law School
Order of the Coif
American Jurisprudence awards in several courses in law school.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

I have been a member of the following bar associations and conferences:

California State Bar Association
617 South Olive Street
Los Angeles, California 90014

Los Angeles County Bar Association
1120 West Third Street
Los Angeles, California 90017

Los Angeles County Barristers
Los Angeles County Bar Association
1120 West Third Street
Los Angeles, California 90017

Women Lawye Association of Los Angeles
Post Office ox 480197
Los Angeles, California 90048

Liaison Memb r
Administrati e Conference of the United States
2120 L Stree , N.W.
Suite 500
Washington, .C. 20037
(202) 254-70 0

I have not served as an officer of these associations.

I have been a member of several committees of various bar associations, including the Business and Corporations Law Section of the Los Angeles County Bar Association.

At Loyola Law School I was a member of many faculty committees, including the Recruitment Committee, the Curriculum Committee and the Tenure Review Committee. I also served as a member or chairman of various faculty members' tenure committees. I served as Chairman of the Faculty Judicial Clerkship Committee for many years.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Other than the bar associations listed above, I belong to no organization that is active in lobbying before public bodies. I belong to the following additional organizations:

Executive Level IV Presidential Appointees
1000 Water Street, SW
Washington, DC 20024

The Federalist Society, DC Bar Chapter
1625 I Street, NW
Washington, DC 20006

Council of Independent Regulatory Agencies
c/o Administrative Conference of the United States
2120 L Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 254=7020

addition I frequently attend monthly breakfast meetings of a religious discussion group.

Nesher Breakfast Club
Post Office Box 18326
Washington, DC 20036

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of California	01/04/67
Supreme Court of Vermont	09/14/72
U.S. District Court (C.D. Cal.)	01/04/67
U.S. District Court (N.D. Cal.)	12/23/68
U.S. Tax Court	09/13/68

12. Published Writings: List the titles, publishers, and dates of books, articles, reports or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 Ga. L. Rev. 425 (1984); reprinted in 17 Sec. L. Rev. 51 (1985).

Liebeler, *Pensions and the Cost of Securities Law Protection*, 11 Loy. L. Rev. 709 (1978).

A Charitable Armageddon: Commissioner v. Clay B. Brown, 13 UCLA L. Rev. 167 (1965).

Book note, 13 UCLA L.Rev. 503 (1966) (reviewing H. Jones, *The Courts, the Public and the Law Explosion* (1965)).

13. Health: What is the present state of your health? List the date of your last physical examination.

I am in excellent health. My last physical examination was in June, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of such court.

In April 1984 I was appointed a Commissioner of the United States International Trade Commission, an independent quasi-judicial agency. The International Trade Commission decides cases under the following statutes:

a. 19 U.S.C. §§ 1671 and 1673 (1982 & cum. supp. 1985)

Under these statutes the Commission decides whether domestic industries have been materially injured or threatened with material injury or whether the establishment of a U.S. industry has been materially retarded by reason of dumped or subsidized imports.

Commission decisions under sections 1671 and 1673 are reviewable in the Court of International Trade, the Court of Appeals for the Federal Circuit and the United States Supreme Court.

b. 19 U.S.C. § 2251 (1982 & cum. supp. 1985)

Under this statute, commonly known as the "escape clause," the Commission decides whether increased imports have been a substantial cause of serious injury or threat thereof to a domestic industry. If the Commission makes an affirmative injury determination, the Commission must then decide what import relief, if any, is necessary to prevent or remedy injury to the domestic industry. The Commission can recommend tariffs, quotas, tariff-rate quotas, adjustment assistance or no relief. Remedy recommendations are made to the President who then decides what remedy, if any, will be given the domestic industry. ITC decisions and remedy recommendations under section 2251 are not reviewable in the courts.

c. 19 U.S.C. § 1337 (1982 & cum. supp. 1985)

Under section 337 of the Tariff Act of 1930 the Commission decides whether a domestic industry has been injured by certain unfair trade practices in connection with imported goods. Most of these cases are intellectual property cases involving patent, trademark or copyright infringement. Upon the filing of a petition by a domestic industry the Commission decides whether to institute the investigation. If instituted, cases are referred to an administrative law judge who makes an initial determination on whether an unfair act has substantially injured or has a tendency to cause substantial injury to the domestic industry.

By ITC rule, any Commissioner can cause the Administrative Law Judge's decision to be reviewed in part or entirely. If the Commission determines that unfair trade practices have substantially injured or have a tendency to cause substantial injury to petitioner, the Commission decides whether to impose a general exclusion order requiring the Customs Service to exclude infringing imports made by all producers, a limited exclusion order under which the Customs Service will exclude only those infringing imports made by certain producers, or a cease and desist order, ordering any person engaging in unfair acts to stop doing so.

After finding a violation of section 337, the Commission must issue a cease and desist order or an exclusion order unless after considering the effect of the orders on the public health and welfare, competitive conditions in the U.S., and U.S. consumers, it finds that such orders should not be issued. During a 60-day period following receipt of the ITC decision, the President can, for policy reasons, disapprove the Commission's decision to grant relief. If not so disapproved, the ITC's decisions became effective and are reviewable in the Court of Appeals for the Federal Circuit and the Supreme Court.

d. 19 U.S.C. § 2436 (1982)

Under this section the Commission decides whether there is "market disruption," i.e., whether rapidly increasing imports from a Communist country are a significant cause of material injury or threat thereof to a domestic industry. If the Commission makes an affirmative injury determination, the Commission must then decide what import relief, if any, will be given the domestic industry. The Commission may recommend an increase in duty or other import restriction necessary to prevent or remedy the market disruption. Remedy recommendations are made to the President who then decides what relief, if any, will be given the domestic industry. ITC decisions under this section are not reviewable.

e. 19 U.S.C. § 1675(b) (1982 & cum. supp. 1985)

Under this section the Commission decides whether existing countervailing duty and antidumping orders should be modified or revoked in the light of changed circumstances. Such decisions are reviewable in the Court of International Trade, the Court of Appeals for the Federal Circuit and the Supreme Court.

f. 7 U.S.C. § 624 (1982)

Under this section the Commission must decide whether imports render or tend to render ineffective, or materially interfere with a U.S. Department of Agriculture program. If the Commission makes an affirmative determination, it can recommend tariffs, quotas or tariff-rate quotas to the President. The Commission's recommendation to the President is not reviewable.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

The following are citations to ten opinions I have written as a Commissioner of the International Trade Commission:

a. In re Certain Aramid Fiber, Inv. No. 337-TA-194, USITC Pub. No. 1824, Akzo, N.V. v. USITC, 808 F.2d 1471 (Fed. Cir. 1986).

b. Certain Red Raspberries from Canada, Inv. No. 731-TA-196 (Final), USITC Pub. No. 1707 (1985).

c. Non-Rubber Footwear, Inv. No. TA-201-55, USITC Pub. No. 1717 (1985).

d. Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela, Inv. Nos. 701-TA-225-234 (Preliminary) and 731-TA-213-217, 219, 221-226, 228-234 (Preliminary) USITC Pub. No. 1642 (1985), appeal pending, United States Steel Corp. v. United States, 85-03-00384, (Ct. Int'l Trade 1986).

e. Wood Shakes & Shingles, Inv. No. TA-201-56, USITC Pub. No. 1826 (1986).

f. In re Certain Products with Gremlins Character Depictions, Inv. No. 337-TA-201, USITC Pub. No. 1815 (1986).

g. In re Certain Alkaline Batteries, Inv. 337-TA-165, USITC Pub. No. 1616, 225 USPQ 823 (1984), disapproved by President Reagan for policy reasons (letter dated Jan. 4, 1985, 225 USPQ 862), appeal dismissed, Duracell, Inc. v. USITC, 778 F.2d 1578 (Fed. Cir. 1985).

h. In re Double-Sided Floppy Disk Drives & Components Thereof, Inv. No. 337-TA-215, USITC Pub. No. 1860, appeal pending, Tandon Corp. v. USITC, No. 86-1077 (Fed. Cir. 1986).

i. In re Certain Optical Waveguide Fibers, Inv. No. 337-TA-189, USITC Pub. No. 1754 (1985), Corning Glass Works v. USITC, 799 F.2d 1559 (Fed. Cir. 1986).

j. Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela, Inv. Nos. 701-TA-242 (Preliminary) and 731-TA-252-253 (Preliminary), USITC Pub. No. 1680 (1985).

Many of my opinions contain confidential information. Please note that I am furnishing you the public version of these opinions. 19 U.S.C. § 1677f (1980 and cum. supp. 1985) provides that the Commission shall not disclose to any person any information designated as confidential by the party submitting it unless 1) the submitting party consents to disclosure; or 2) the information is disclosed in a form which cannot be associated with operations of a particular person. Much of the information submitted to the Commission is classified as confidential business information under Commission Rules 201.6 and 210.6, 19 C.F.R. §§ 201.6 and 210.6 (1984).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have been a Commissioner of the U.S. International Trade Commission since April 1984. The President designated me Vice Chairman in June 1984 and Chairman on June 17, 1986. I have held no other public office. I have never been a candidate for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

9/66-9/67

Judicial Clerk
Honorable Gordon Files
Presiding Judge
California Court of Appeals
Second Appellate District, Division Five
Los Angeles, California

Justice Files is now retired. His home address and phone number are:

Honorable Gordon Files
154 South Arroyo Boulevard
Pasadena, California 91105
Telephone: (818) 449-6203

9/67-4/68

Associate
Gang, Tyre & Brown
6400 Sunset Boulevard
Los Angeles, California 90028

4/68-6/70

Associate
Greenberg, Bernhard, Weiss & Karma
1800 Century Park East, Suite 1150
Los Angeles, California 90067

This firm is no longer in existence. Three partners with whom I worked closely are Herbert A. Bernhard, Arthur Karma and Barry Weiss. Their present addresses are:

Herbert A. Bernhard, Esq.
Jeffer, Mangels & Butler
1900 Avenue of the Stars
Los Angeles, California 90067
Telephone: (213) 203-8080

Arthur Karma, Esq.
Karma, Coleite & Bence
21231 Hawthorne Boulevard
Suite 350
Torrance, California 90503
Telephone: (213) 543-4623

Barry Weiss, Esq.
Pepper, Hamilton & Sheetz
606 South Olive Street
Los Angeles, California 90014-1567
Telephone: (213) 617-8151

6/70-6/71

Associate General Counsel
Republic Corp.
1900 Avenue of the Stars
Los Angeles, California 90067

Three lawyers I worked closely with at Republic Corp. are Alan Stamm, General Counsel, Raymond J. Ferris and Peter Pancione. Their present addresses are:

Alan Stamm, Esq.
O'Donnell & Gordon
619 South Olive Street
Suite 300
Los Angeles, California 90014
(213) 688-1566

Raymond W. Ferris, Esq.
Executive Vice President and Chief Financial Officer
Mattel Corp.
5150 Rosecrans
Hawthorne, California 90250
(213) 978-5150

Peter Pancione, Esq.
Gibson, Hoffman & Pancione
1888 Century Park East
Los Angeles, California 90067
(213) 556-4660

Summer 1971 to Summer 1972

John Burgess, Esq.
50 Western Avenue
Brattleboro, Vermont 05301
(802) 254-2353

From September 15, 1971 to March 15, 1971, I completed six months of registered law study in conformity with State of Vermont Board of Bar Examiner's Rule 1.6 and 5.2, Part II in order to be admitted to practice in Vermont. Thereafter, I worked for Mr. Burgess on an hourly basis.

9/72-12/72

During this period I handled indigent appeals for the California Court of Appeals.

1/73-5/74

General Counsel (1/73 - 8/73)
Consultant 8/73 to 5/74
Verit Industries
9300 Wilshire Boulevard
Beverly Hills, California

I had accepted a teaching position at Loyola Law School for the fall of 1973. My commitment to Verit, therefore, was on a short-term basis. While with Verit I worked closely with the company's outside counsel, Irell & Manella. Two Irell & Manella lawyers with whom I worked frequently are:

Edmund M. Kaufman, Esq.
Peter Gregora, Esq.
Irell & Manella
1800 Avenue of the Stars
Los Angeles, California 90067
(213) 879-2600

9/73-4/84

Professor of Law
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015

Attorneys and professors familiar with my professional qualifications and work while I was a professor at Loyola Law School are:

Theodore Bruinsma, Esq.
Former Dean, Loyola Law School
University Technology Transfer, Inc.
9841 Airport Boulevard, Suite 504
Los Angeles, California 90045
Telephone: (213) 641-8648

Janet Davidson, Esq.
Paul, Hastings, Janofsky & Walker
555 South Flower Street
Los Angeles, California 90071
Telephone: (213) 489-4000

Annette Fields, Esq.
Debevoise & Plimpton
1777 F Street, NW
Washington, DC 20006
Telephone: (202) 289-0100

Samuel Gruenbaum, Esq.
Cox, Castle & Nicholson
2049 Century Park East
Los Angeles, California 90067
(213) 277-4222

Alan Ides, Esq.
Associate Dean
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015
Telephone: (213) 736-7000

Michael Josephson, Esq.
Josephson Foundation
13323 Washington Boulevard
Los Angeles, California 90066
Telephone: (213) 306-1868

Professor Gideon Kanner
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90066
Telephone: (213) 736-1058

Professor Norman Karlin
Southwestern University School of Law
675 South Westmoreland Avenue
Los Angeles, California 90005
Telephone: (213) 738-6700

Roberta Klein, Esq.
Rosenfeld, Parnell & Shames
1875 Century Park East
Los Angeles, California 90067
Telephone: (213) 557-1000

Professor Travis Lewin
Syracuse University College of Law
Ernest I. White Hall
Syracuse, New York 13210
Telephone: (315) 423-2524

Michael Lightfoot, Esq.
Talcott, Lightfoot, Vandervelde,
Woehrle & Sadowsky
727 West Seventh Street, Suite 430
Los Angeles, California 90017
Telephone: (213) 622-4750

Professor John McDermott
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015
Telephone: (213) 736-1101

Rita Miller, Esq.
Munger, Tolles & Rickershauser
612 South Flower Street
Los Angeles, California 90017-2885
Telephone: (213) 683-9100

Hon. Stephen Reinhardt
U.S. Court of Appeals for the Ninth Circuit
1757 U.S. Court House
312 N. Spring St.
Los Angeles, CA 90012
Telephone: (213) 894-3639

Martha S. Robinson, Esq.
625 Old Mill Road
Pasadena, California 91108
Telephone: (818) 795-7323

Minda R. Schechter, Esq.
Sullivan, McWilliams, Lewin,
  Markham & Disner
10920 Wilshire Boulevard
Suite 1000
Los Angeles, California 90024
Telephone: (213) 208-4900

Professor Frederick Sedgwick
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015
Telephone: (213) 736-1138

Lloyd Tevis, Esq.
90 Costa Azul
Los Osos, California 93402
Telephone: (805) 528-5406

Professor David Tunick
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015
Telephone: (213) 736-1090

On several occasions while on leave of absence from Loyola Law School I served as consultant, special counsel or visiting professor to the following federal agencies:

1972

Consultant to the General Counsel
United States Price Commission
Washington, DC

I worked with the General Counsel, David Slawson. His present address is:

Professor David Slawson
University of Southern California Law Center
University Park
Los Angeles, California 90089
Telephone: (213) 743-7331

9/74-12/74

Lawyer, Consultant
United States Environmental Protection Agency
Washington, DC

1/75-8/75

Consultant to the General Counsel
United States Railway Association
Washington, DC

Three lawyers with whom I worked closely at USRA were Jordan J. Hillman, General Counsel, Douglas Siegel, Deputy General Counsel, and Cary Dickieson, Associate Counsel. Their present addresses are:

Professor Jordan J. Hillman
Northwestern University Law School
357 East Chicago Avenue
Chicago, Illinois 60611
Telephone: (312) 908-8447

Cary Dickieson, Esq.
Vice President and Chief Operating Officer
United States Railway Association
955 L'Enfant Plaza North, SW
Washington, DC 20595
Telephone: (202) 488-8777

Douglas Siegel, Esq.
509 South Taylor Street
Arlington, Virginia 22204
Telephone: (703) 892-5960

12/80-1/81

Consultant
Office of the President Elect (often referred to as the Transition Team)

An attorney with whom I worked was Michael Uhlmann. Mr. Uhlmann's present address is:

Michael Uhlmann, Esq.
Pepper, Hamilton & Scheetz
1777 F Street, NW
Washington, DC 20006
Telephone: (202) 842-8100

8/81 to 6/82

Special Counsel to Chairman John S. R. Shad
Securities and Exchange Commission
Washington, DC 20549
Telephone: (202) 272-2000

Two attorneys with whom I worked at the SEC were Daniel Goelzer, Executive Assistant to the Chairman and Diane Klinke, Attorney-Advisor to the Chairman. Their present addresses are:

Diane Klinke, Esq.
Deputy General Counsel
Municipal Securities Rulemaking Board
1818 N Street, NW
Washington, DC 20036
Telephone: (202) 223-9467

Daniel Goelzer, Esq.
General Counsel
Securities and Exchange Commission
Washington, DC 20549
Telephone: (202) 272-3171

6/82-8/82

Visiting Professor
University of Texas Law School
727 East 26th Street
Austin, Texas 78705

4/84-Present

Commissioner
Chairman 6/86 -
Vice Chairman (6/84 - 6/86)
United States International Trade Commission
701 E Street, NW
Washington, DC 20436
Telephone: (202) 523-0133

The following attorneys are also familiar with my professional qualifications:

Bruce Aitken, Esq.
Busby, Rehm & Leonard, PC
1330 Connecticut Avenue, NW
Suite 200
Washington, DC 20036
Telephone: (202) 857-0700

Judy Bello, Esq.
Deputy General Counsel
United States Trade Representative
600 17th Street, NW
Washington, DC 20506
(202) 395-3150

James N. Bierman, Esq.
Foley & Lardner
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006
Telephone: (202) 862-5300

Calvin Collier, Esq.
Hughes, Hubbard & Reed
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 626-6200

Professor Mark Grady
Northwestern University Law School
357 East Chicago Avenue
Chicago, Illinois 60611
Telephone: (312) 908-8447

Gary Horlick, Esq.
O'Melveny & Myers
1800 M Street, NW
Washington, DC
(202) 457-5300

C. Douglas Kranwinkle, Esq.
Munger, Tolles & Rickershauser
612 South Flower Street
Los Angeles, California 90017-2885
Telephone: (213) 683-9100

Harold Marsh, Esq.
Brobeck, Phleger & Harrison
444 South Flower Street
Los Angeles, California 90017
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Honorable Stephen Reinhardt
United States Court of Appeals for the Ninth Circuit
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-3639

Honorable Francis Rothschild
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012
(213) 974-5881

Loren R. Rothschild, Esq.
President
American Protection Industries
12233 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 826-5253

Tom M. Schaumberg, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 783-0800

Honorable Patricia M. Schwartz
Commissioner
Los Angeles Municipal Court
6230 Sylmar Avenue
Van Nuys, California 91401
Telephone: (818) 901-3735

Professor Warren Schwartz
Georgetown Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
Telephone: (202) 624-8362

Deanne N. Seimer, Esq.
Wilmer, Cutler & Pickering
1666 K Street, NW
Washington, DC 20006
Telephone: (202) 872-6165

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b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As a judicial clerk I performed the normal functions of that position. I researched legal issues on a wide variety of cases; I consulted with Justice Files and other judges in the division and their law clerks; I drafted and edited bench memoranda and opinions.

Gang, Tyre & Brown is a small firm specializing in entertainment law. Most of their clients were in the entertainment industry and included performing artists, writers, advertising agencies, a newspaper and business managers. In order to provide full service to the clients, the firm also had a general business practice. I worked with several partners in the firm on a variety of civil matters.

The non-litigation matters included client counseling and research on tax, corporate, trademark and estate planning issues and the drafting of various documents including licensing agreements, recording and personal services contracts, partnership and joint venture agreements, buy-sell contracts among shareholders and wills.

I spent about 20% of my time on litigation matters described infra.

I also worked on several matters involving various city, county, state and federal agencies including the Immigration and Naturalization Service, the California Franchise Tax Board, the California Commissioner of Corporations, and the Los Angeles County Tax Collector.

In 1968 I went to work for another small firm in Los Angeles, Greenberg, Bernhard, Weiss & Karma. The firm had a general business practice with a wide variety of individual and corporate clients. The firm's clients included several savings and loan associations, physicians and hospitals. The corporate clients ranged from small, closely-held corporations to larger, publicly-owned firms.

Approximately one-quarter of my time was spent on litigation matters described infra. The non-litigation matters on which I worked involved estate planning, probate, real estate financing and leasing, advising clients on the appropriate form of doing business, and negotiating and drafting partnership agreements, articles of incorporation, shareholder buy-sell agreements, corporate minutes, wills and other documents. Because several of the firm's clients were involved with acquisitions, I worked on many merger matters which involved federal and state administrative agencies, including the California Commissioner of Corporations, the California Savings and Loan Commissioner, the Federal Savings and Loan Insurance Corporation, the California Commissioner of Insurance, the Securities and Exchange Commission, the Internal Revenue Service and the California Franchise Tax Board.

I devoted an increasing amount of time to securities regulation matters. I requested no-action letters from the SEC and I provided clients with written opinions on the validity of various transactions under the federal and state securities laws. The 1964 amendments to the Securities Exchange Act of 1934 (Exchange Act) required certain corporations whose shares were traded in the over-the-counter market to register with the Securities and Exchange Commission. The firm represented several savings and loan associations that had not been previously subject to SEC regulation. (Their shares are exempt from registration under the Securities Act of 1933.) I worked with these clients on their Form 10 registration statements. I prepared proxy statements, 10K annual reports and other SEC filings for these clients. I also provided client counseling and drafted extensive memoranda to these clients explaining the continuous reporting requirements to which they were now subject, the obligations of the clients and their officers and directors under sections 10(b) and 16(b) of the Exchange Act, and other implications of the securities laws.

1970-1971

> I was Associate General Counsel for Republic Corporation, a New York Stock Exchange company, with subsidiaries and operating divisions in many product lines, including manufacturing, steel, film and printing. One of my responsibilities at Republic was to coordinate and monitor the various litigation matters involving Republic and its subsidiaries that were being handled by outside counsel.
>
> I also handled various SEC matters--I had primary responsibility for the drafting and filing of proxy statements and annual 10K reports; I advised the client and its directors and officers of their responsibilities and liabilities under the federal securities laws, including sections 10(b) and 16(b) of the Exchange Act; I provided advice on whether shares of the corporation's stock which had been previously issued pursuant to an

exemption from registration under the Securities Act of 1933 could be transferred without violation of the securities laws. In addition I worked with outside counsel on various employee benefit plans, including the qualification and registration of shares to be issued under those plans under the federal and state securities laws; I negotiated and drafted agreements for the acquisition and divestiture of various businesses of Republic Corporation; I organized the corporation's annual shareholders' meeting; I reviewed advertisements and press releases for Republic and its subsidiaries.

I also provided advice on a wide variety of matters to many of Republic Corporation's subsidiaries, including Consolidated Film Industries. These matters included intellectual property issues, real estate transactions, and bank loan agreements. In addition, I had primary responsibility for administering the company's employee stock option plan.

1971-1972

During this period I worked for John Burgess, an attorney in Brattleboro, Vermont. I completed six months of registered law study to qualify for admission to the Vermont Bar. About 80% of my workload involved real estate matters. I spent about twenty percent of my time assisting Mr. Burgess with major tort litigation in the federal courts. See Lapiczak v. Zaist described infra.

I returned to California in the fall of 1972 and for several months handled criminal indigent appeals before the California Court of Appeals. This involved a review of the record, client interviews and the writing and filing of appellate briefs.

1973-74

I was General Counsel and later a consultant to Verit Industries, a small conglomerate listed on the American Stock Exchange Company. My commitment to Verit was a short-term one; I had already accepted a teaching position for the fall of 1973. As General Counsel, I monitored all outside litigation for the company. I participated in litigation strategy decisions with outside counsel on a wide variety of cases, including federal court litigation involving SEC Rule 10b-5, breach of contract, and rescission.

I had responsibility for negotiating and drafting a variety of corporate and commercial agreements, including leases, bank loan agreements, acquisition and divestiture contracts, and employment contracts.

I was also responsible for the drafting and filing of proxy statements, annual reports, and other SEC filings for the client. I provided opinions on whether stock could be transferred without registration under federal and state securities laws and set up procedures for handling transfers of securities under SEC Rule 144. I prepared and reviewed press releases and handled a variety of corporate and commercial matters for Verit's subsidiaries. I organized and ran the corporation's annual stockholders' meeting.

1973-1984

At Loyola Law School I taught courses on securities regulation, corporations, legal ethics, business and tax planning, financial institutions, and various seminars on corporate law. I served as a judge in moot court competitions and served as a faculty advisor to students enrolled in the law school's moot court programs. I advised and supervised many student independent research projects and papers. My primary research interests were in corporate and securities law, and law and economics. My interest in law and economics began in 1979 when I attended a two week economics program for law professors given by the University of Miami Center for Law and Economics.

As a professor of law I participated in and organized several symposia and panel discussions, many sponsored by various bar associations. I provided written comments on SEC rulemaking proceedings; I provided comments on bar examination questions to the Committee of Bar Examiners; I wrote and published articles on corporate and securities law and presented papers and lectured in a variety of forums; I refereed articles and books submitted by others for publication to West Publishing Company and various journals.

1981-1982

While on leave from teaching, I served as Special Counsel to SEC Chairman John S. R. Shad. I advised Chairman Shad on a variety of regulatory issues, including tender offer regulations, issuer repurchase transactions, rule-making, jurisdictional matters involving SEC regulation of financial institutions, and enforcement actions. I assisted the Chairman in preparing testimony on a variety of legislative initiatives.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
(a) jury;
(b) non-jury.

I spent approximately 20-25% of my time at Gang, Tyre & Brown and later at Greenberg, Bernhard, Weiss & Karma on litigation matters. In 1974 I began teaching law school and I no longer have my chronological or form files from practice. The law firm of Greenberg, Bernhard, Weiss & Karma is no longer in existence and its old records are in warehouse storage in Los Angeles. I regret that I am unable to provide greater details about these matters.

From September 1972 through December of 1972 I handled indigent criminal appeals for the California Court of Appeals. While I accepted no more assignments of cases after December of 1972, several of these matters were ongoing and not completed for several months. The majority of my litigation experience, however, concerned civil matters. Most were decided by motion or settled prior to trial.

At Gang, Tyre and Brown I made court appearances in the Los Angeles County Superior Court in a probate matter and I tried an unlawful detainer action before a judge in the Van Nuys Municipal Court. I worked with several partners in the firm on various other litigation matters and drafted pleadings, motions, and supporting documents. These matters included a breach of contract suit in the federal court, and personal injury, divorce, libel and partnership dissolution cases in the state court. I also worked with partners in the firm on a major civil rights case. See Rosenberg v. Southern Pacific discussed infra.

As an associate with Greenberg, Bernhard, Weiss & Karma, I tried approximately twelve unlawful detainer cases in various municipal courts and obtained judgments in my client's favor in all of them. All were non-jury cases. I also tried one uncontested divorce case before a judge. I had primary responsibility for filing and trying unlawful detainer cases for several savings and loan clients who had continuing problems with foreclosures and hold-over tenants.

I worked with Herbert Bernhard and Arthur Karma, two litigation partners in the firm, on a variety of litigation matters. I drafted pleadings, interrogatories, motions and supporting memoranda and affidavits. On many of these cases I engaged in discovery, including depositions and motions. Other than the unlawful detainer trials described above, I did not have primary responsibility for trying cases. My court appearances were primarily on discovery motions. Like most corporate and commercial litigation, many of the cases on which I worked were settled prior to trial.

Some of the firm's litigation, or its settlement, involved the issuance or repurchase of corporate stock. Because of my growing expertise in corporate and securities law, I often played a major role in negotiating and drafting settlement agreements in such cases. In connection with these settlements I provided written opinions on the validity of various transactions under the federal and state securities laws, and when necessary, qualified shares for issuance, or for exemption, with the California Commissioner of Corporations and with the Securities and Exchange Commission.

I worked on several cases involving a commercial leasing company client. These cases concerned foreclosure of the client's security interest in leased property and recovery of deficiencies owing under the lease.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The following is a general description of the major litigation in which I participated:

a. Rosenfeld v. Southern Pacific Company, U.S. Dist. Ct., C.D. Cal. Civ. N. 67-1377-F. Gang, Tyre & Brown represented the plaintiff, a female employee who sued her union and employer for violation of the Civil Rights Act, who alleged that she was denied the position of agent-telegrapher solely on the basis of sex. The employer had refused to hire plaintiff because applicable California laws limited work hours and weight lifting by female employees. I worked with partners in the firm on drafting an amended complaint and a motion for summary judgment and supporting memorandum of points and authorities. The case was before Judge Warren Ferguson who granted the plaintiff's motion for summary judgment against her employer, holding that 1) California laws and regulations restricting hours worked and weight lifting by women employees are contrary to the Civil Rights Act of 1964 and Article VI, Clause 2 of the U.S. Constitution; and 2) the defendant employer discriminated against plaintiff solely on the basis of sex in violation of the Civil Rights Act. Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (1968), 444 F.2d 1219 (9th Cir. 1971), 519 F.2d 527 (9th Cir. 1975).

b. Lapiczak v. Zaist. I worked on this case with plaintiff's counsel, John Burgess. My involvement in the case began after a decision of the U.S. Court of Appeals for the Second Circuit reversed an order of the district court that set aside a jury verdict for defendant and ordered a new trial on its own initiative. The district court had denied as untimely plaintiff's motion for a new trial. The Court of Appeals held that the amendment of Rule 59(d) of the Federal Rules of Civil Procedure, permitting the court to order a new trial on its own initiative, did not affect the requirement that the order for a new trial be entered no later than ten days after judgment. 451 F.2d 79 (2d Cir. 1971).

I prepared motions and supporting affidavits under Rule 60(b) of the Federal Rules of Civil Procedure to the district court to set aside the judgment on the grounds of mistake, inadvertence, surprise and excusable neglect.

c. Sterling Savings & Loan Assn. v. Arnold (Riverside County Superior Court). Greenberg, Bernhard, Weiss & Karma represented the plaintiff savings and loan association in a fraud action against a general contractor and several subcontractors. I worked closely with Arthur Karma, a partner, on discovery and preparing the case for trial. I prepared motions for summary judgment and judgment on the pleadings and supporting memoranda. I made several court appearances on a variety of discovery motions including motions to compel answers to interrogatories. The case was settled prior to trial.

d. Bau & Schwab v. Revlon, Inc. (Los Angeles County Superior Court). I worked with Herbert Bernhard, a partner in the law firm of Greenberg, Bernhard, Weiss & Karma on the trial of this case. The firm represented Revlon which had been sued by an inventor for breach of fiduciary duty and breach of contract. It was alleged that the invention had been disclosed to defendant in confidence and that defendant used the invention and refused to pay plaintiff for it. I assisted Mr. Bernhard in discovery and preparation for trial. The case was tried and taken under submission and was settled while under submission.

e. Chow v. Parkside (U.S.D.C., N.D. Calif.). Greenberg, Bernhard, Weiss & Karma represented an investor who, on behalf of a group of Chinese-American investors, sued a promoter for breach of fiduciary duty. The case was bifurcated into separate liability and damage trials. I began working with Herbert Bernhard, a partner in the firm, after the liability issue had been resolved in plaintiff's favor.

I engaged in discovery and assisted Mr. Bernhard in preparing the damage phase for trial. It was tried before Judge William T. Sweigert and judgment was entered for plaintiffs. There was no appeal.

f. Silver v. Beverly Hills Nat'l Bank (Los Angeles County Superior Court). Greenberg, Bernhard, Weiss & Karma represented the plaintiff, who sued to recover a loan made to a business venture. Defendant argued that the plaintiff's interest was equity, not debt. I worked with Herbert Bernhard, a partner, on appealing a judgment for defendant. The appeal was successful and I worked with Mr. Bernhard on preparing the case for new trial.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

The following are descriptions of significant legal activities I have pursued as a lawyer and professor of law:

1. The law firm with which I was associated represented several savings and loan companies. Because the stock of savings and loans is exempt from registration under the Securities Act of 1933, savings and loans had previously been regulated by state and federal financial regulatory bodies and not by the SEC. When the Securities and Exchange Act of 1934 (Exchange Act) was amended in 1964 to bring certain over-the-counter companies under its continuous reporting requirements, I worked with several of these savings and loan associations to prepare and file their initial registration statements with the SEC. I explained the continuous reporting requirements to them and helped them draft their periodic reports required under the Exchange Act. I helped these clients prepare and mail proxy material in compliance with SEC proxy regulations. I helped organize their annual shareholders meetings. I also prepared memoranda and lectures for their managers on complying with the federal securities law and SEC regulations, including those relating to gains from so-called "short swing" transactions in the company's stock.

2. A law firm with which I was associated represented a savings and loan association which had recently registered its stock under section 12 of the Exchange Act. In connection with the first annual shareholders meeting held after it became subject to SEC regulation, the SEC took the position that its account holders were security holders and their proxies had to be solicited annually under SEC proxy regulations. (Under applicable law the account holders of

this savings and loan association had one vote per hundred dollars in their account.) Solicitation of account holders would have been very expensive and undesirable for the client. I had several discussions and meetings with SEC staff. The SEC changed its position and the client did not have to solicit its account holders.

3. I represented an investor who had purchased shares of common stock in a public company. The broker mistakenly sent him shares of another company with a similar name which were worth much more than the stock my client had ordered and paid for. This occurred before brokerage firms were computerized and thus the mistake was not discovered for more than eighteen months. During this period my client had been paid substantial dividends on the stock.

When the mistake was discovered, the broker referred the matter to law enforcement authorities and demanded that my client return the stock. I represented my client in the civil and criminal matters. My client was not prosecuted and I negotiated a settlement with the brokerage firm.

4. I represented a publicly-owned conglomerate which was acquiring various businesses. I represented the company in negotiating the acquisition of many businesses, through stock for stock, stock for assets, and merger type transactions. In addition to negotiating the acquisition, I prepared all the documentation in connection with these acquisitions.

5. I represented a publicly-owned firm which had purchased all of the stock of a privately-held company from its shareholders in exchange for stock in the public company. The former owners of the subsidiary were employed as managers. The stock of the public company had depreciated in value and the former owners claimed that my client had made material omissions in violation of SEC rule 10b-5. They sought rescissions of the acquisition agreement. I negotiated a settlement of this lawsuit whereunder the plaintiffs purchased the company from my client.

6. When a public company I represented defaulted on its bank loan agreement, I renegotiated its bank debt with the lead bank. I filed appropriate disclosure forms with the SEC describing the default and the terms of the renegotiated debt and new loan agreement.

7. I was a consultant to the United States Price Commission in 1972 during wage and price controls. When the President imposed a freeze on utility rate increases, many utilities with scheduled rate increases were surprised and petitioned the Commission for an exemption from the rate increase. I handled many of the requests for exemption.

Many of the scheduled rate increases involved millions of dollars. One very large utility threatened to ignore the freeze and put its scheduled rate increase into affect. Had it done so, it might have encouraged many utilities to ignore the freeze. I negotiated an arrangement whereunder the utility suspended its rate increase and the Price Commission agreed to give expedited consideration of the utility's request for an exemption from the freeze.

8. As a consultant to the United States Railway Association I drafted significant portions of the Final System Plan describing the assets and property of the Penn Central Railroad which were to be acquired by Conrail. Because of my background in corporate law I helped plan for the conveyancing and closing.

9. While teaching at Loyola Law School, I became concerned that the business and tax course offerings were not well structured to provide students with an in-depth background in corporate, commerical or tax law. Moreover, many liberal arts majors had no background in accounting, business or finance and had difficulty in mastering corporate and tax law.

To remedy these problems, I organized an ad hoc faculty committee to study the curriculum and recommend changes. The Committee reviewed the curricula of other law schools and the available teaching materials for teaching corporate, tax and commercial law. To make sure that the students received appropriate guidance in their studies, the Committee drafted specific course descriptions and a recommended progression of studies for students who wished to specialize in either business, commercial or tax law. Basic survey courses were recommended for those students who did not wish more than an introduction to these areas of the law.

As part of the restructuring of the curriculum, I determined that the law and accounting course offered by the law school was not useful. This course was taught by an accountant who taught students basic bookkeeping. I spent several weeks designing a new course in accounting concepts. The purpose of the course was to provide a basic understanding of accounting concepts to enable students to converse with accountants and to teach students to read balance sheets and other financial statements. I recruited a member of the bar with a Harvard MBA and substantial business experience to teach the course. Together we reviewed and developed teaching materials for this course. The course was recommended as a prerequisite for corporations and tax courses for students with little or no background in business.

This year-long project resulted in a major restructuring of the tax, commercial and business law curriculum at the law school.

10. When I served as Special Counsel to the Chairman of the SEC, I became involved with several proposals to permit banks and other financial institutions to engage in securities activities. This lead to my interest in regulation of financial institutions.

After I left the SEC in June of 1982, I taught a course in financial regulations in summer school at the University of Texas Law School. Because of the rapidly changing laws and regulations governing financial institutions, the law school texts were outdated. I developed my own course materials and taught a course in comparative regulation of financial institutions. I taught this course again at Loyola Law School.

Susan Liebeler
United States Senate
Committee on the Judiciary
Questionnaire for Judicial Nominees

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers

   I have no such arrangements or relationships with business associates, clients or customers. TIAA-CREFF, The Teachers Insurance and Annuity Association-College Retirement Equities Fund, offers a qualified employee benefit plan in which many universities participate. Loyola Marymount University participated in this plan. I have vested rights under this plan which accrued during the period I taught at Loyola Law School. The present value of these rights is approximately $65,000.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   If confirmed, I would not sit on any appeals from decisions of the U.S. International Trade Commission in which I participated as a Commissioner. I would not sit on any matter involving a party in which I held a beneficial interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   I have no such plans.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   I have never had a major position or played a major role in a political campaign.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Not applicable.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

A net worth statement is attached.

Susan Liebeler
United States Senate
Committee on the Judiciary
Questionnaire for Judicial Nominees

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-solution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe firmly in separation of powers. Accordingly, I feel that it is inappropriate for a judge to intrude on the legislative and executive functions.

In providing for three branches of government, the Constitution sets forth a system of checks and balances to ensure the accountability of each branch. The drafters of the Constitution were suspicious of a strong federal government and for that reason did not grant it broad powers.

The framers intentionally made it difficult to pass laws and even more difficult to amend the Constitution. Judges should not circumvent this purposely arduous process by legislating or changing the Constitution. While it is entirely appropriate that elected legislators debate and decide controversial issues, federal judges who are appointed for life should not presume to do so.

There has been significant criticism of some forms of judicial activism, particularly when judges intrude into the management and oversight of various institutions. There is little in the training and experience of lawyers and judges to suggest that they are particularly well suited to supervising large institutions such as hospitals, prisons and school systems.

Moreover, there are costs associated with an activist judiciary. First, the prospect of judicial legislation creates uncertainty and makes it more costly for parties to contract. Second, judicial activism tends to relieve legislators of responsibility for making difficult decisions.

When, for political or other reasons, the other branches fail to address social problems, judges should exercise discipline and restraint to avoid usurping legislative or executive powers. The responsibility for addressing societal ills should be left to the legislative and executive branches.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

I believe that equality under the law is a fundamental principle underlying our democratic system. It is a principle that distinguishes governments in the free world from totalitarian governments and other regimes where freedom and equality are reserved for the ruling class. Public perception that the legal system offers equal justice promotes confidence and support for legal institutions, thereby ensuring the continuity and stability of the government.

As a law student, practicing attorney and professor of law I have provided pro bono services:

1. As a third year law student I worked with Stephen Wittenberg, a practicing attorney in Los Angeles (Mr. Wittenberg was my spouse at the time), preparing an appeal for an indigent defendant who had been convicted of mail fraud. Neither Mr. Wittenberg nor I were compensated for this work.

2. While I was an associate at Greenberg, Bernhard, Weiss & Karma, I provided pro bono legal services to a young, disadvantaged poet. I counseled my client on a variety of matters relating to copyright law and contract matters.

3. I represented Vista Del Mar, a private, non-profit child-care agency for Jewish children on a variety of child care matters, including adoptions and adoption revocations. I provided pro bono legal services to several low income Jewish parents in adoption proceedings.

4. As a professor of law, I worked with the Mayor's Office in Los Angeles to set up a clinical program to provide advice to minority enterprises wishing to incorporate. Under my supervision students set up non-profit corporations and provided counseling on a variety of legal issues to several day-care centers in Watts and East Los Angeles and to a group providing support services for the handicapped.

5. While I was on the faculty of Loyola Law School, Loyola had an extensive recruitment program for disadvantaged students, who while they did not meet ordinary admission standards, were permitted to enter the law school. As a teacher of corporations, a second year required course, I found that many of these students needed special tutoring in accounting, general business concepts and in the course materials. For many years I sponsored twice weekly tutoring seminars in addition to regularly scheduled classes for these students. I also provided tutoring on exam-taking and gave and graded practice examinations for these students.

SUSAN WITTENBERG LIEBELER
SUPPLEMENTARY RESPONSES TO UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

11. Court Admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

I am an inactive member of the bar in California and in Vermont.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

When I was a student at UCLA Law School, I was a senior editor of the Law Review and edited several student and professional articles. I have no recollection of their titles or subject matter but they would have been published in Volume 13 of the UCLA Law Review.

I am sending a cpy of my speeches under separate cover.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

According to the 1986 TIAA CREFF Report of Annuity Premiums and Benefits for the year ending December 31, 1986, at a retirement average of 65 I would have the right to a life time annuity with annual income payments of $19,767. If I had died on December 31, 1986, $65,947.81 would have been payable to my beneficiary.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

If confirmed, I would not sit on any appeals from decisions of the U.S. International Trade Commission in which I participated as a Commissioner. I would not sit on any matter involving a party in which I or my spouse or dependent children held a beneficial interest. I would consult and comply with the Canons of the ABA Code of Judicial Conduct and the Code of Judicial Conduct for United States Judges and other applicable laws, regulations and canons relating to ethical matters. During my initial service, the most likely categories of cases that would present potential conflicts of interest would involve appeals from decisions of the United States International Trade Commission. I would not sit on any appeals from decisions of the United States Trade Commission on cases which were at the Commission while I was a Commissioner.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

During the preceding and present calendar year I have been employed by the United States Government as a Commissioner and Chairman of the United States Trade Commission. A copy of my 1986 and 1987 Executive Personnel Financial Disclosure Report is enclosed.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In my original response to the Judiciary Committee, I listed the following service to the disadvantaged:

(a) As a third year law student I worked with Stephen Wittenberg, a practicing attorney in Los Angeles (Mr. Wittenberg was my spouse at the time), preparing an appeal for an indigent defendant who had been convicted of mail fraud. Neither Mr. Wittenberg nor I were compensated for this work.

I do not recall the exact amount of time that I worked on this case as it was more than twenty years ago. My recollection, however, is that I spent a substantial amount of time on this matter.

(b) While I was an associate at Greenberg, Bernhard, Weiss & Karma, I provided pro bono legal services to a young, disadvantaged poet. I counseled my client on a variety of matters relating to copyright law and contract matters.

I no longer have my records on this matter so I am unable to identify the amount of time I spent on this matter. I estimate that it exceeded 25 hours.

(c) I represented Vista Del Mar, a private, non-profit child-care agency for Jewish children on a variety of child care matters, including adoptions and adoption revocations. I provided legal services to several low income Jewish parents in adoption proceedings.

I no longer have my files on this matter so I do not have a record of exactly how much time I spent on adoption proceedings or Vista Del Mar matters. My best recollection is, however, that there was a case involving an adoption revocation in which low income parents wished to give up a child that they had adopted because the child was brain damaged and they were unable to afford the proper care for the child. I believe that this matter was complicated and required many hours of work.

(d) As a Professor of law, I worked with the Mayor's Office in Los Angeles to set up a clinical program to provide advice to minority enterprises wishing to incorporate. Under my supervision students set up non-profit corporations and provided counseling on a variety of legal issues to several day-care centers in Watts and East Los Angeles and to a group providing support services for the handicapped.

As a law professor I did not keep time cards and have no idea precisely how much time I spent with these students. I spent at least 75 hours supervising one student named Burton Cohen in connection with an incorporation of a day-care center in Watts and a manual that he wrote for use by faculty and students involved in similar projects.

(e) Loyola Law School had an extensive recruitment program for disadvantaged students, who while they did not meet ordinary admission standards, were permitted to enter the law school. As a teacher of corporations, a second year required course, I found that many of these students needed special tutoring in accounting, general business concepts and in the course materials. For many years I sponsored twice weekly tutoring seminars in addition to regularly scheduled classes for these students. I also provided tutoring on exam-taking and gave and graded practice examinations for these students.

As a law professor I did not keep time records. My best estimate is that on average I spent approximately four hours a week on these matters during the school year.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies?. If so, list, with dates of membership. What have you done to try to change these policies?

To the best of my knowledge, I have never belonged to an organization which, through formal membership requirements or practical implementation of membership policies, invidiously discriminates on the basis of race, sex or religion. As a child I was a Brownie and a Girl Scout and both of these organizations only admitted females. In junior high school and high school I was a member of B'nai Brith Girls, an organization whose membership was limited to Jewish girls. I often attend monthly breakfast meetings of the Nesher Breakfast Group, a religious discussion group. The group has no formal by-laws or membership. Its ground rules suggest that those attending the breakfast discussion should be of the Jewish faith.

3. (Judicial Nominees Only) Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no formal selection commission to recommend candidates for nomination for the Court of Appeals for the Federal Circuit. I was contacted by the Justice Department and asked if I would be interested in being considered for a seat on the Court of Appeals for the Federal Circuit. I was then interviewed by several lawyers in the Department of Justice.

4. (Judicial Nominees Only) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No one involved in the process of selecting me as a judicial nominee discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking an express or implied assurance concerning my position on any such case issue or question.

AFFIDAVIT

I, SUSAN WITTENBERG LIEBELER, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 22, 1987

Susan Liebeler

Susan Liebeler

María Bonilla -Williams

Notary

My Commission Expires January 31, 1989

DON J. PEASE
13TH DISTRICT, OHIO

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COMMITTEE ON
WAYS AND MEANS

SUBCOMMITTEE ON TRADE

SUBCOMMITTEE ON
PUBLIC ASSISTANCE AND
UNEMPLOYMENT COMPENSATION

Congress of the United States
House of Representatives
Washington, DC 20515

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June 18, 1987

The Honorable Joseph Biden
United States Senator
Chairman, Committee on the Judiciary
224 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Joe:

It has come to my attention that your committee is currently reviewing the nomination of Susan W. Liebeler, Chairman of the International Trade Commission, to the Court of Appeals for the Federal Circuit. I am writing to convey my deep concern about Chairman Liebeler's nomination.

In the course of my duties as a member of the House Ways and Means Subcommittee on Trade, I have become familiar with Chairman Liebeler's record at the International Trade Commission. Her voting record and case opinions amount to a marked departure from the Commission's reputation for non-partisan, faithful administration of U.S. trade remedy laws.

In particular, the Chairman persists in the use of highly irregular methodology as a proxy for certain statutory tests. The trade bill reported by the House Ways and Means Committee includes specific language to proscribe some of the Chairman's unorthodox practices. In taking this action, the Committee was mindful that Chairman Liebeler's performance has been the object of private criticism by many members of the bar and of public criticism by a few, courageous members of the bar and even a fellow Commissioner. In this connection, I would call to your attention an unprecedented public critique of Chairman Liebeler's record by fellow ITC Commissioner Alfred Eckes, a Republican, in an opinion on a recent case. In the March 1986 case, Certain Ethyl Alcohol from Brazil, Commissioner Eckes states:

> . . . (T)he net effect of some of my colleagues' reasoning has been to discard the carefully crafted statutory tests and to revise the law by administrative fiat. In my view, the Commission's statutory findings cannot and should not be made by improvising a host of dubious, arbitrary, and illegitimate analytical techniques, such as "proxies," "presumptive tests," and "elasticities," to rationalize negative determinations. The statute is generally clear, and those of us charged with administering it have no business substituting academic fictions for the factual record and our own judgment.
>
> Since the Trade Agreements Act of 1979 was implemented, most Commissioners have tried to administer our trade laws with fairness and impartiality. From time to time, our reviewing courts may have disagreed with individual Commission decisions, but the Commissioners

> generally have worked diligently and in a nonpartisan manner to apply the law as it was written by Congress. And from this sensitivity to statutory construction and legislative intent has emerged an extensive corpus of case law that establishes a transparent framework for the predictable administration of our trade laws.
>
> To me the new revisionism is a threat to the fairness, predictability, and integrity of our trade law system. In devising substitutes for the statute, the revisionists offer the parties only proxies, presumptions and abstractions, not the certainty of consistent statutory interpretation. Parties --- both domestic and foreign --- cannot be sure what factors will be dispositive when statutory standards are explained away, bent, or simply disregarded.

To my mind, Chairman Liebeler's tendency to give greater weight to ideological predilection than to congressional intent raises serious questions about her nomination to serve on the federal bench. As you know, Congress is on the verge of passing historic legislation to improve the nation's trade laws and policies. Chairman Liebeler's record epitomizes the ideological, laissez-faire approach to international trade policy that is largely responsible for the enormous trade problems we now face. If confirmed, she would serve on what is effectively the court of last review for trade remedy cases. If her record at the Commission is any guide, Ms. Liebeler's presence on the court would further undermine public confidence in the fairness and impartiality of the trade laws and, by extension, the open international trading system.

In the interest of maintaining an effective and credible international trade policy based on free and fair trade, I urge you and your colleagues to take a long, hard look at Chairman Liebeler's nomination. Thank you for your consideration of this matter. I would be pleased to discuss it further at your convenience.

Sincerely yours,

Don Pease

DON J. PEASE
Member of Congress

DJP/rs

CURT WELDON
7TH DISTRICT, PENNSYLVANIA

COMMITTEE ON ARMED SERVICES
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DEFENSE POLICY PANEL
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1987 AUG -3

July 30, 1987

The Honorable Strom Thurmond
United States Senate
218 Russell Senate Building
Washington, D.C. 20515

Dear Senator:

I would like to express my support for President Reagan's nomination of Susan Liebler to the United States Circuit Court of Appeals. Mrs. Liebler is presently Chairman of the United States International Trade Commission.

Hearings on her nomination are scheduled for August 6, 1987 before the Senate Judiciary Committee. I am enclosing a copy of her resume for your information and urge your support of Mrs. Liebler when confirmation comes before the Senate.

Sincerely,

Curt Weldon

CURT WELDON
Member of Congress

CW/cc
Enclosure

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WILLIAM J. WILKINS, STAFF DIRECTOR AND CHIEF COUNSEL
MARY MCAULIFFE, MINORITY CHIEF OF STAFF

United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

SENT TO ALL MEMBERS OF JUDICIARY COMMITTEE

January 26, 1988

The Honorable Edward Kennedy
United States Senate
Washington, D.C. 20510

Dear Ted:

Before the Judiciary Committee takes up the nomination of Susan Liebeler to the Court of Appeals for the Federal Circuit, I wanted to be sure you were aware of my opposition to this appointment.

I first met Mrs. Liebeler when whe was nominated to the International Trade Commission, and I opposed her appointment to that body because I felt she lacked the background, experience, perspective, and temperament for the position. In my judgment, her performance at the Commission has validated my original concerns. She has demonstrated an ideological approach to trade law and economics that has allowed her to ignore both the law and Congressional intent in reaching conclusions that have regularly been at variance with those of most of the other commissioners. Regrettably, this is exactly the opposite of "judicial restraint" and represents the kind of activism that the President says he is opposed to.

Late last year I spoke on the Senate floor regarding Mrs. Liebeler's nomination to the Court of Appeals, and I hope you will review my comments before you consider her. I have enclosed a copy for your information. I think the cause of impartial, objective justice would not be well served by putting Mrs. Liebeler on the Court, and I hope you will oppose her nomination.

Sincerely,

John Heinz
United States Senate

JH/brj

It is important that all segments of the rehabilitation community join together in a spirit of mutual respect and complementary unity to form true partnerships for the productive independence, equality, and mainstream social participation of all people with disabilities.

As chairman of the subcommittee, I will be vigilant to assure that the policies for which he stood and the programs under the jurisdiction fo the Rehabilitation Services Administration will not be impaired. I also am determined that the management-structural issues and other problems within the Department that are having an adverse impact on the delivery of services to people with disabilities will be resolved.●

NOMINATION OF SUSAN LIEBELER TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

● Mr. HEINZ. Mr. President, the nomination of Susan Liebeler to the Court of Appeals for the Federal Circuit is presently pending in the Judiciary Committee. I intend to oppose that nomination and want to take a few minutes to explain my thinking.

Let me first state, Mr. President, that I am not a lawyer and will leave discussions of legal fine points to those who are. My nearly 9 years on the Finance Committee, however, have given me some familiarity with trade law, and I believe I am qualified to speak with some authority as to congressional intent on trade legislation. I am also familiar with Mrs. Liebeler, since she appeared before the committee on several occasions during the process of her confirmation as a member of the International Trade Commission, and, of course, I have followed Commission activities closely during her tenure.

I opposed Mrs. Liebeler's nomination to the ITC, as did a number of other members of the committee. Based on my private meeting with her and her responses in the hearings the committee held, I concluded at the time that she was unfamiliar with trade law and appeared to have little interest in learning more about it or congressional intent with respect to it. I believed she would use her position at the Commission to advance her own ideological approach to trade issues in defiance of the law and the facts, and I believe subsequent history has proved my fears correct. I would also state my belief that had not some extraneous factors involving another vacancy at the Commission intruded, the committee would likely have rejected her nomination.

What I learned from that episode, Mr. President, is that Mrs. Liebeler is an intelligent woman of strong views who has powerful friends in the White House. The President called me—right next door in the cloakroom—to lobby personally for her nomination to the ITC, and I anticipate similar pressures will be employed this time around as well.

Nevertheless, I intend to oppose her nomination to the court, just as I opposed her previous appointment. During the Judiciary Committee's hearings on Mrs. Liebeler, a number of allegations were made regarding her temperament and past behavior. While I believe these are relevant issues for the Senate's consideration, and the allegations are damaging, my opposition is not based on them. Rather it is based on Mrs. Liebeler's interpretation of the laws under her jurisdiction on the Commission.

To put it simply, Mr. President, I believe Mrs. Liebeler's record at the Commission is one of consistently distorting both the letter and spirit of U.S. law to suit her own ideological preconceptions, which happen not to be in the mainstream of current economic or legal thinking.

Obviously, this is a matter of judgment, and I recognize that others who have followed Commission proceedings closely may not agree with my analysis. I take comfort, however, in the fact that there are many who do share my view, although they have regrettably not been willing to come forward publicly. Indeed, one of my personal disappointments in the consideration of the nomination thus far is the refusal of many in the trade bar to address this nomination one way or the other. In a way, I do not blame them, since they will be practicing before Mrs. Liebeler regardless of the disposition of the nomination, but it is unfortunate that those with the greatest firsthand experience are so reluctant to state their views on the record.

Fortunately for the process and the edification of Senators, there is one group that has not only conducted the most thorough investigation of any of the bar associations evaluating her record but has been both eloquent and blunt about its conclusions. I refer to the Customs and International Trade Bar Association, which found Mrs. Liebeler unqualified—I repeat, unqualified—for the position to which she has been nominated, and they have explained why in some detail. Although I intend to place the Association's entire statement in the RECORD following my remarks, I want to cite in particular one passage that reflects the essence of my concern with Mrs. Liebeler:

> A review of Mrs. Liebeler's opinions filed in anticumping, countervailing duty and unfair act (19 U.S.C. 1337) cases leads to the conclusion that Mrs. Liebeler consistently decides cases based on her belief as to what the law ought to be rather than on the basis of criteria enunciated in the statutes. This conclusion is consistent with the views of other Commissioners as reflected in their opinions in the same cases, in critiques of Mrs. Liebeler's opinions found in the opinions of other Commissioners * * * in the report of the Committee on Ways and Means * * * on H.R. 3 * * * and in the report of the Committee on Finance * * * on S. 490, as well as in published and unpublished comments of practitioners before the Commission.

Mrs. Liebeler's fondness for using "proxy" criteria as substitutes for those mandated by law exemplifies her determination to find ways to avoid having to make a decision based on the facts of the case. Despite her denials before the Judiciary Committee, Mrs. Liebeler's opinions make clear that the standard she insists on for causation in dumping and countervailing duty cases is essentially a predatory one, even though the statute does not contemplate that. Indeed, the Customs and International Trade Bar Association's investigation comes to the same conclusion.

The difficulty of meeting Mrs. Liebeler's test is reflected in the contrast of her voting record with those of her colleagues. In a study of Commission voting covering the period from April 20, 1984, to May 18, 1987, Mrs. Liebeler voted in the affirmative on final antidumping investigations 15 percent of the time in contrast with an average of the other commissioners of nearly 62 percent. On final countervailing duty investigations, Mrs. Liebeler voted affirmative 3 percent of the time, while the other commissioners' average was over 57 percent. I have never argued that statistics like these ought to be dispositive of a nominee's record, but I do think they provide a quantitative perspective on the extent to which she is out of step with her colleagues of both parties holding various points of view on trade issues.

Another point stressed by the Bar Association is Mrs. Liebeler's failure to follow court decisions when her position is overruled. Since she has been in the minority on many of her opinions, most of her positions have not been tested in court. Those that have have not fared that well; yet she demonstrates a certain tenacity to holding on even to those where she has been reversed. The Association statement provides details on this subject that I will not repeat at this time, but I want to reiterate my concern at what appears to be a willingness to ignore what everyone else—Congress, the courts, fellow commissioners, trade lawyers of all points of view—says is the law in favor of her own peculiar and quasi-analytical approach.

Mr. President, this is not a detailed analysis of my objections to Mrs. Liebeler's views. If the Judiciary Committee approves her nomination and it comes to the floor, I expect to discuss it in greater detail at that time. Right now, I simply want to alert Senators to my concern about this nomination and bring to their attention the report of the Customs and International Trade Bar Association. I ask that that document be printed at this point in the RECORD.

The document follows:

Report of the Board of Directors of the Customs and International Trade Bar Association on the Nomination of Susan Wittenberg Liebeler to the U.S. Court of Appeals for the Federal Circuit

INTRODUCTION

This Report is submitted by the Board of Directors of the Customs and International Trade Bar Association on the nomination of Susan Wittenberg Liebeler to the United States Court of Appeals for the Federal Circuit.

The Customs and International Trade Bar Association is a national organization, well over a half-century old, whose members are attorneys engaged in the practice of customs and international trade law. In addition to representing importers, domestic manufacturers, exporters, customs brokers, surety companies, and others before the International Trade Commission, the Customs Service, and other federal agencies, the Association's members regularly practice before the Court of International Trade and its appellate court, the Court of Appeals for the Federal Circuit.

Consequently, our members are vitally concerned with the nominees to these courts and, in fact, we perform two related but distinct functions with respect to judicial appointments. One, from time to time, we recommend, for the consideration of the Executive Branch, persons believed by us to be qualified and experienced in international trade law. Two, we endeavor to evaluate the Executive's nominees and to provide our evaluation to the Committee on the Judiciary of the United States Senate.

After having received, considered, and deliberated over the report of the Bar Association's Judicial Selection Committee and after having reviewed the reputation, writings, and qualities of Mrs. Liebeler, the Board of Directors has formed the opinion that Mrs. Liebeler is not qualified to serve as a judge on the Court of Appeals for the Federal Circuit. Specifically, the Board finds that the nominee lacks the necessary objectivity and judicial temperament. We make this finding with particular regret since Mrs. Liebeler has already acquired some experience in international trade law, a factor which ordinarily would be an asset to a nominee to the Federal Circuit.

Our Judicial Selection Committee conducted a careful and fair investigation into Mrs. Liebeler's qualifications. Mrs. Liebeler is, of course, Chairman of the International Trade Commission, an agency on which she has served since April 1984. Between 1973 and 1984, she was a law professor at Loyola Law School. The Committee conducted interviews of Mrs. Liebeler, of other Commissioners past and present, of past and present Commission personnel, of members of the former student body, faculty, and administration of Loyola Law School, and of numerous attorneys who have practiced regularly before the Commission. The Committee has also studied Mrs. Liebeler's responses to questionnaires of our Association, of the American Bar Association, and of the Senate Judiciary Committee, has reviewed the police and court records associated with her arrest in Vermont in 1973, and has interviewed the former Attorney General of Vermont who, in his capacity as State's Attorney, had filed criminal charges against Mrs. Liebeler. Judicial Selection Committee members as well as the members of this Board have studied and familiarized themselves with the written opinions and statements of Mrs. Liebeler. Additionally, Committee and Board members, by virtue of their wealth of professional experience and their continuing practice and study, are extremely familiar with the relevant statutes, case law, and administrative precedents and practices which form the body of trade law.

Our reasons for finding Mrs. Liebeler "Not Qualified" are set forth below. We will begin by discussing the comments of various Commissioners, staffers, practicing attorneys, and members of the Loyola Law School community. We will then proceed with a discussion of the decisions and opinions that Mrs. Liebeler has rendered while sitting on the Commission. Finally, we will comment on the Vermont incident.

Interviews of Commissioners, Commission Staff, and Practicing Trade Attorneys.—In its investigation, the Judicial Selection Committee interviewed all Commissioners who serve or who have served with Mrs. Liebeler on the International Trade Commission. The Committee has also interviewed numerous practicing trade lawyers and Commission staff personnel.

During those interviews, Mrs. Liebeler was repeatedly described in the following terms or language similar thereto: "Intelligent" or "Very intelligent"; "Ideologue"; "Totally lacking in objectivity"; "Prejudiced"; "Result-oriented"; "Totally unsuited for the bench"; "Temperamentally unfit" or "Unquestionably not fit" to be a judge; "She would not be a fair and objective judge"; "She does not have judicial temperament"; "She proceeds theoretically rather than by evaluating facts"; "Her judgment gets clouded by her ideals and lack of trust"; "She is unable to work with people she disagrees with"; "She disagrees with the law and does not feel constrained by the law"; "She is uncomfortable with the statutory task of the Commission which, from time to time, requires providing protection [under the antidumping and countervailing duty laws]".

One person, who expressed personal fondness for Mrs. Liebeler, opined that she "would make an awful judge—on patents [19 U.S.C. § 1337 cases], she would be overly protectionist; on antidumping and countervailing duty cases, she would craft ways to gut the statutes." She was also described as "lacking intellectual honesty", as having "knowingly reasoned improperly to avoid protection", as being "hostile" to federal employees.

On the other hand, one Commissioner opined that Mrs. Liebeler would make a "superb judge". This Commissioner stated that Mrs. Liebeler, in addition to being "extremely intelligent", "knows the law" and has "enormous ability"; she has "high standards" and has the "courage of her convictions". Also, a reputable practicing attorney, whose substantive positions Mrs. Liebeler has consistently voted against, opined that Mrs. Liebeler should be confirmed as a judge. This attorney, acknowledging her intellectual ability, expressed the opinion that Mrs. Liebeler has demonstrated great "courage" by remaining steadfast in her views in the face of intense and often shrill criticism directed toward her from numerous sources, including her colleagues, practicing lawyers, and members of Congress.

Interviews of Members of the Loyola Law School Community.—As noted, the Judicial Selection Committee conducted interviews of members of the former student body, faculty, and administration of Loyola Law School. The opinions of those persons interviewed were essentially consistent with the opinions of the vast majority of those persons interviewed of the trade law community. Thus, she was described as "Intelligent"—but, again, she was repeatedly described as an "Ideologue" or an "Ideologue—enamored of economic solutions to everything"; as "Not objective"; as "Not open-minded"; as one who "prejudges issues"; as one who "could not work well with other people"; as one who "could not get along with the vast majority of the faculty and administration; as one who was "disdainful of most of the student body".

She was repeatedly described as "not a good" teacher, who had "difficulty communicating", who did not appear to like teaching, and who was unpopular with the students because of her "arrogance, impatience, and lack of clarity in the classroom".

She was repeatedly viewed as one who did not have the judicial temperament to be a judge.

COMMISSION OPINIONS

The most frequent and troubling comments regarding Mrs. Liebeler by those interviewed—that she is an ideologue lacking in objectivity and dispassionate reasoning—appear to be confirmed by Mrs. Liebeler's opinions as a Commissioner.

A review of Mrs. Liebeler's opinions filed in antidumping, countervailing duty and unfair act (19 U.S.C. § 1337) cases leads to the conclusion that Mrs. Liebeler consistently decides cases based on her belief as to what the law ought to be rather than on the basis of criteria enunciated in the statutes. This conclusion is consistent with the views of other Commissioners as reflected in their opinions in the same cases, in critiques of Mrs. Liebeler's opinions found in the opinions of other Commissioners (e.g., Commissioner Eckes in *Certain Ethyl Alcohol From Brazil*, Inv. Nos. 701-TA-239 and 731-TA-248 (Final), USITC Public. 1818 at 40-53 (March 1986), and Commissioner Stern in *In the Matter of Certain Aramid Fiber*, Inv. No. 337-TA-194, USITC Public. 1824 at 8-9 n.15 (March 1986)), in the report of the Committee on Ways and Means of the U.S. House of Representatives on H.R. 3 (the Trade and International Economic Policy Reform Act of 1987) (H.R. Rep. No. 40, Part 1, 100th Cong., 1st Sess. 127-31 (1987)), and in the report of the Committee on Finance of the U.S. Senate on S. 490 (the Omnibus Trade Act of 1987) (S. Rep. No. 71, 100th Cong., 1st Sess. 115-18 (1987)), as well as in published and unpublished comments of practitioners before the Commission.

We emphasize that this conclusion is not directed to Mrs. Liebeler's interpretations of the statutes, or to whether her opinions are "right" or "wrong". We are most mindful of the duty of an adjudicative official to interpret a statute consistently with that official's determination of the intent of the legislature, and that responsible persons will differ in their perceptions of legislative intent. In general, we accept that views expressive of such differences are not a reason to find a nominee to a federal appellate court to be unqualified.

The issue which Mrs. Liebeler's opinions raise is that she consistently rejects the guidance of the Congress as set forth in the statutes governing antidumping, countervailing duty, and unfair act cases and replaces it with decisional criteria of her own creation. Her opinions reveal that Mrs. Liebeler's biases lead her to oppose relief for domestic industry in antidumping and countervailing duty cases without considering the governing statutory criteria and to favor relief for domestic industry in unfair act cases also without considering the governing statutory criteria.

In antidumping and countervailing duty cases, the statute requires the Commission to determine whether a domestic industry is materially injured or is threatened with material injury by reason of dumped or subsidized imports. Material injury is "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). Congress has not limited the range of factors which the Commission may consider in rendering the injury determination. However, Congress has specified that the Commission shall consider (1) the volume of imports which are subject to the investigation, (2) the effect of such imports on prices in the United States for like products, and (3) the impact of such imports on domestic producers of like products. 19 U.S.C. § 1677(7)(B). Further, Congress has specified that (1) in evaluating the volume of imports, the Commission shall consider whether the volume of imports or any increase in such volume is significant; (2) in evaluating the price effect of imports, the Commission shall consider, inter alia, whether prices of dumped or subsidized imports undercut prices of like domestic product to a significant degree or prevent price increases; and (3) in examining the impact of dumped or subsidized imports on domestic producers of competing goods, the Commission shall evaluate all relevant economic factors, including the actual and potential decline in sales which those producers face. 19 U.S.C. § 1677(7)(C). Finally, Congress has specified that the Commission shall cumulatively assess the volume and effect of imports from two or more countries "of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market." Id.

Mrs. Liebeler does not follow this statutorily mandated analysis which focuses on objective economic factors. Rather, her analysis, set forth initially in *Certain Red Raspberries From Canada*, Inv. Nol. 731-TA-196 (Final), USITC Public. 1707 (June 1985), starts from the premise that the antidumping and countervailing duty laws are intended to combat predatory import practices which requires analysis of subjective intent:

"The fact that Congress referred to *unfair* price descrimination suggests to believe [sic] that Congress meant some type of predatory pricing. Predatory pricing is a form of strategic behavior in which a firm lowers the price of its product below the marginal cost of production." Id. at 14 (emphasis in original). Thus, Mrs. Liebeler reads into the statute something which cannot be found in its text—a requirement that predation be present for material injury to exist. In fact, the criteria enunciated in the statute for the determination of injury are entirely objective and do not depend on subjective considerations involving intent.

Mrs. Liebeler stated that "ideally" the Commission would gather cost of production data, but that since this is difficult to accomplish, "the Commission must look to relevant proxies." She believes that "market share and pricing trends are the appropriate subjects for examination. Although this information is not dispositive of the predation issue, large and growing market share and deteriorating price trends are necessary conditions for a predatory behavior." Id. at 15.

Because Mrs. Liebeler believes that material injury cannot exist in the absence of predatory intent, she has established criteria to govern her analysis to the exclusion of the statutorily mandated objective criteria: (1) large and increasing market share; (2) high dumping margins; (3) homogeneous products; (4) declining prices; and (5) barriers to entry to other foreign producers (low elasticity of supply of other imports).

Id. at 16. Mrs. Liebeler's consistently expressed belief is that material injury cannot exist unless at least several of these criteria are strongly manifested in a given case. Thus, in *Agricultural Tillage Tools From Brazil*, Inv. No. 701-TA-223 (Final), USITC Public. 1761 at 24-27 (Oct. 1985), she found to be legally insignificant a 15.9 percentage point increase in market share by subsidized imports, an 8.06 percent subsidy rate, and a price decline in one of two sizes of the merchandise under consideration because (1) she did not find significant barriers to the entry of other imports and (2) since the subsidized imports were priced lower than the domestic product and since "[t]he greater the difference in the price of competing the [sic] goods, the more they differ," the price difference between the subsidized imports and the domestic goods implied a lack of homogeneity between them.

In *Certain Welded Carbon Steel Pipes And Tubes From India, Taiwan, And Turkey*, Inv. Nos. 731-TA-271 through 273 (Final), USITC Public. 1839 at 51 (April 1986), Mrs. Liebeler dispensed with the statutory requirement that price undercutting be considered, stating:

"We do not generally consider the 'underselling margins' set forth in Commission reports to be particularly persuasive evidence of price undercutting or probative on the issue of causation. And we do not find the data on underselling gathered by the Commission in this case to be useful. In brief, when there are price differences we expect that they are usually explained by differences in the items compared. Rarely will all of the characteristcs of the imported product exactly match those of the domestic product. Even when products appear to be identical (e.g., a bushel of wheat), a correct price comparison would have to take into account factors other than the exchange of ownership of the product. . . . Merely comparing transaction prices and making a seat-of-the-pants judgment that the products are 'homogeneous' is not a useful exercise."

Further, in *Certain Welded Carbon Steel Pipes And Tubes From Thailand And Venezuela*, Inv. Nos. 701-TA-242 and 731-TA-252 (Preliminary), USITC Public. 1680 at 19 (April 1985), Mrs. Leibeler indicated that she believed that the Commission need not consider the criteria specified by Congress to render a material injury determination unless one of two conditions were met: either that the domestic market exhibit characteristics demonstrating that "a relatively small level of imports could result in any material injury or threat of material injury" or that there be "an import penetration ratio" of at least 2.5 percent.

Again, it is not our function to comment upon either the logic, the economic validity, or the wisdom of Mrs. Liebeler's views. It is our intention solely to provide examples of the abandonment of statutory criteria by Mrs. Liebeler in favor of the criteria which she believes the Congress should have adopted.

It has been observed in various articles and other written comments that Mrs. Liebeler has also applied a test of cumulation different from that required by statute. In brief, Mrs. Liebeler refused to cumulate the volumes, prices and impact of dumped imports with subsidized imports and refused to cumulate data relating to goods under pending investigations with like goods which were the subject of recently issued remedial orders. In this instance, we do not conclude that Mrs. Liebeler's actions were contrary to the manifest language of the statute. We note only our deep concern that her strong ideological principles and less than objective approach have once again led her to conclusions which are contrary to the expressed legislative intent set forth in the congressional committee reports and which have been rejected by the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit. See *Certain Carbon Steel Products From Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, And Venezuela*, Inv. Nos. 701-TA-225 through 234 and 731-TA-213 through 217, 219, 221 through 226, 228 through 235 (Preliminary), USITC Public. 1642 at 41-50 (Feb. 1985), and *Oil Country Tubular Goods From Canada And Taiwan*, Inv. Nos. 701-TA-255 and 731-TA-276 and 277 (Final), USITC Public. 1865 at 15-20 (June 1986). See also *Bingham & Taylor, Division, Virginia Industries, Inc.* v. *United States*, 10 CIT , Slip Op. 86-14 (Feb. 14, 1986), and *Id.* v. *Id.*, 815 F.2d 1482 (Fed. Cir. 1987).

A second category of cases in which the Commission is required to render an injury determination is unfair act cases under section 337 of the Tariff Act of 1930. This section requires the Commission to determine whether the effect or tendency of unfair methods of competition and unfair acts in the importation of articles is to destroy or substantially injure a domestic industry. 19 U.S.C. § 1337. Frequently, the unfair act complained of is infringement of intellectual property rights such as trademarks and patents.

In this type of case, apparently due to her conviction that intellectual property rights deserve automatic protection, Mrs. Liebeler rejects the Commission's obligation to make the statutory injury determination and employs a per se injury rule instead. She has stated:

"Importation of a product which infringes a valid patent will *always* affect the patent holder adversely. . . . The Commission should, therefore, employ its most lenient injury test in Section 337 patent cases.

"There is no reason why the Commission's standards in Section 337 cases should differ significantly from those used by district courts in intellectual property cases. In that forum there is strict liability for patent infringement; infringement alone justifies an injunction. . . . The construction of elaborate and strict injury tests is neither contemplated by the statute, nor does it serve any public purpose."

In the Matter of Certain Optical Waveguide Fibers, Inv. No. 337-TA-189, USITC Public. 1754 (Sept. 1985) (Views of Vice Chairman Liebeler at 1-2) (emphasis in original).

Mrs. Liebeler issued the foregoing views in September 1985, eight months after the United States Court of Appeals for the Federal Circuit had issued its decision in *Textron, Inc.* v. *U.S. International Trade Commission*, 753 F.2d 1019 (Fed. Cir. Jan. 24, 1985), wherein the court had ruled (at 1028-29):

"Contrary to Textron's assertion, section 337 does not function merely as the international extension of our patent, trademark and copyright laws. See *In-the-Ear Hearing Aids*, Tariff Commission Publ. No. 182 at 28 (July 1966). Instead, section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof. Id. Congress may well have included this separate requirement in the original 1930 version of section 337 to insure that the extreme and internationally provocative remedy contemplated therein—exclusion of imports from particular countries—would be implemented only when this is compelled by strong economic reasons. See, e.g., S. Rep. No. 93-1298, 93d Cong., 2d Sess. 199 (1974); reprinted in 1974 U.S. Code Cong. & .Ad. News 7186, 7331. Although the contemplated range of remedies was expanded by the Trade Act of 1974 to include "softer" sanctions such as cease-and-desist orders, Congress has never altered the statute's injury requirement. In fact, Congress expressly rejected a Nixon Administration attempt to eliminate the injury requirement in its proposed Trade Reform Act of 1973. See H. Kaye, et al., International Trade Practice § 6.05 n.1 (1984).

Mrs. Liebeler's apparent unwillingness to put aside her personal beliefs where a court has ruled against her position is shown further by her opinion in *In the Matter of Woodworking Machines*, Inv. No. 337-TA-174, USITC Public. 1979 (May 1987):

"With regard to the industry [sic: injury] issue, I note that there is evidence on the record that woodworking machines that infringe the two registered trademarks, the one common-law trademark, and the registered logo have been imported into the United States and sold to consumers. This evidence is sufficient to establish injury and tendency to injure for these industries. Similarly, there is evidence on the record that establishes that woodworking machines that infringe the three patents have been imported into the United States and sold to consumers. This is sufficient to establish injury and tendency to injure for these three industries." Additional Views of Vice Chairman Liebeler at 1-2.

Mrs. Liebeler issued the foregoing statement in May 1987, more than two years after the court's Textron decision and nine months after the court's ruling in *Corning Glass Works v. U.S. International Trade Commission*, 799 F.2d 1559, 1567 (Fed. Cir. Aug. 27, 1986). In the Corning decision, the court quoted the language of the Textron decision set forth above and then stated:

"Because section 337 does not function merely as an international extension of private rights under the patent statute, the statements of this court on the showing of injury required for the grant of an injunction in a patent infringement suit cannot be taken out of context and applied to the issuance of an exclusion order in a section 337 proceeding. Upon a patentee's proof of continuing infringement of a valid enforceable patent, "immediate irreparable harm is presumed" in connection with a request to a district court for injunctive relief. . . . Congress has, however, required more for an exclusion order against imports, as recognized by this court unequivocally in Textron. The Commission is, thus, correct in its statement, "[S]ection 337 has elements in addition to the establishment of the existence of unfair practices such as patent infringement which must be satisfied before relief [i.e., an exclusion order] can be granted.'" *In re Certain Optical Waveguide Fibers*, slip op. at 21 [majority opinion of Commission, from which Mrs. Liebeler dissented].

We, of course, are aware that the trade legislation currently under consideration by the Congress proposes to eliminate the injury requirement in section 337 cases involving certain intellectual property rights. The Association's members are divided on the desirability of this proposed change—many support the change and many others oppose it. However, we are in agreement that unless and until this change is made in the law, the statute now in force and the court opinions interpreting it require, beyond any possible doubt, an injury determination in each section 337 case. Mrs. Lieberler's opinions in this area indicate that she does not acknowledge the supremacy of the statute and court decisions over her private views when called upon to perform her public duty as a Commissioner.

In sum, Mrs. Liebeler's writings as a Commissioner show that she opposes relief for domestic industry in antidumping and countervailing duty cases and favors relief for domestic industry in unfair acts cases on the basis of her personal beliefs as to what the laws ought to say rather than on the basis of what the laws and the court decisions interpreting them do say.

THE VERMONT ARREST

In her American Bar Association questionnaire response, Mrs. Liebeler indicated that, in 1973, she had been arrested in Vermont and charged with extortion and acting as an accessory to extortion. We have reviewed the court and police records relevant to the incident that gave rise to the arrest and the June 29, 1987 letter to Senator Leahy from Mr. M. Jerome Diamond, the former State's Attorney who had charged Mrs. Liebeler; our Judicial Selection Committee monitored the August 6, 1987 Senate Judiciary Committee hearing on Mrs. Liebeler and interviewed Mr. Diamond.

We are concerned, not just over the self-help incident that led to Mrs. Liebeler's arrest, but by the way in which she has attempted to explain the incident away. In her American Bar Association response, she explained that "a young and inexperienced State's Attorney, who had apparently been advising the tenant, filed charges against me." After noting that criminal charges against her were dropped, she proceeded to state: "There was no basis in law or fact for the criminal charges." She annexed a supporting letter from the attorney who had defended her at the time.

The prosecuting attorney, Mr. Diamond, slightly older than Mrs. Liebeler, was 31 years old when he charged her with a crime. He did so in his capacity as State's Attorney, a position to which he had been elected. The following year, he was elected to the first of three consecutive terms as Attorney General of the State of Vermont. During his interview with our Judicial Selection Committee, Mr. Diamond categorically denied that he was representing the tenant at the time of his prosecution of Mrs. Liebeler. Further, a court found probable cause for the charges when it issued an arrest warrant and it again found probable cause when it denied the motion to dismiss.

We will not burden this report with a recitation of the facts alleged in the police and court records or with a summary of the testimony presented at the August 6, 1987 hearing; suffice it to say, however, that the explanation offered by Mrs. Liebeler for her arrest is too facile and is unsatisfactory.

CONCLUSION

It is with regret that we must conclude that Mrs. Liebeler is not qualified to be a judge on the United States Court of Appeals for the Federal Circuit. While her intellectual ability is undoubtedly substantial, the evidence strongly suggests that she lacks the objectivity and judicial temperament to be a judge. While some have remarked on her "courage" under fire or her having the "courage of her convictions", such traits are cause for grave concern when found in a person appointed to the judiciary to apply statutes as written by the Congress and interpreted by earlier court decisions, especially where, as in the case of Mrs. Liebeler, the person's existing body of opinions as a Commissioner indicates that personal convictions override the rule of law.

It is the very strength of her convictions that worries us. We do not wish to have judges bound by particular convictions or ideologies or by preconceived notions of how disputes should be resolved. We wish and need to have judges who are fair, open-minded, and able to mete out justice dispassionately.

It should be understood that our Bar Association is not wed to any particular political philosophy or economic ideology. Our members run the gamut across the philosophical and political spectrum: there are members who favor virtually unfettered free trade and those who are supportive of protection; there are members who represent primarily import and foreign export interests and members who represent primarily domestic manufacturers; there are Republicans, Democrats, Independents, and non-politicals; there are conservatives and liberals. The position we have taken with respect to Mrs. Liebeler's nomination here is wholly divorced from any of those political or ideological concerns. The question we have addressed is whether we, as lawyers, believe that the nominee possesses the essential qualities to be a judge of the United States Court of Appeals for the Federal Circuit.●

ROBERT T. STAFFORD ELEMENTARY AND SECONDARY EDUCATION IMPROVEMENT ACT

(NOTE.—On yesterday, the Senate passed H.R. 5, as amended by S. 373, as amended. The text of the bill as passed follows:)

Resolved, That the bill from the House of Representatives (H.R. 5) entitled "An Act to improve elementary and secondary education, and for other purposes", do pass with the following amendment:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Robert T. Stafford Elementary and Secondary Education Improvement Act of 1987".

SEC. 2. TABLE OF CONTENTS.

Sec. 1. Short title.
Sec. 2. Table of contents.

TITLE I—BASIC PROGRAMS

CHAPTER 1—FINANCIAL ASSISTANCE TO MEET SPECIAL EDUCATIONAL NEEDS OF CHILDREN

Sec. 1001. Declaration of policy and statement of purpose.

PART A—BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

SUBPART 1—ALLOCATIONS

Sec. 1005. Basic grants.
Sec. 1006. Grants for local educational agencies in counties with especially high concentrations of children from low-income families.

SUBPART 2—BASIC PROGRAM REQUIREMENTS

Sec. 1011. Uses of funds.
Sec. 1012. Applications.
Sec. 1013. Eligible schools.
Sec. 1014. Eligible children.
Sec. 1015. Schoolwide projects.
Sec. 1016. Parental involvement.
Sec. 1017. Participation of children enrolled in private schools.
Sec. 1018. Fiscal requirements.
Sec. 1019. Evaluations.
Sec. 1020. Applications by State educational agencies.
Sec. 1021. Program improvement.
Sec. 1022. Educational improvement plan and activities.

PART B—PROGRAMS FOR SECONDARY SCHOOL BASIC SKILLS IMPROVEMENT AND FOR SCHOOL DROPOUT PREVENTION

Sec. 1101. Statement of purpose.
Sec. 1102. Allocation.
Sec. 1103. Uses of funds.
Sec. 1104. Applications.
Sec. 1105. Award of grants.
Sec. 1106. Fiscal requirements.
Sec. 1107. Evaluations and program improvement.
Sec. 1108. Authorization of appropriations.

[illegible]
Finance
Banking, Housing and
Urban Affairs
Energy and Natural Resources

Washington, D.C. 20510

March 11, 1985

Commissioner Susan Liebeler
U.S. International Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

Dear Commissioner Liebeler:

I have examined with interest your opinion in the Commissioner's preliminary determinations in investigations Nos. 701-TA-225-234 and Nos. 731-TA-213-217, 219, 221-226, and 228-235.

Although I disagree with a number of elements of it, and will address the cross statute cumulative issues in a separate letter, I am particularly disturbed by your arbitrary conclusion that import penetration ratios of less than 2.5 percent are too small to be a cause of material injury, or that increases in the ratio that still leave it at less than 2.5 percent are too small to constitute threat of injury.

Aside from the fact that I can find no legal or economic justification for such a conclusion, I recall that Congress went to great lengths in 1979, in legislation, legislative history and meetings with Commissioners, to make clear its determination that each case be judged on the facts relevant to it and not on the basis of arbitrary standards applied to all cases regardless of the facts.

In determining whether dumped or subsidized imports have caused material injury to a domestic industry, the ITC is required to consider whether "the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. S 1677 (C)(i). In adopting this guidepost, Congress recognized that the "significance" of a particular volume of imports will vary with the nature of the product imported, the structure and concentration of the industry affected, and the marketing practices that characterize distribution of the imports. The probability that the significance of imports will vary from case to case is the basis for the requirement that the Commission consider in each investigation the factors listed in the statute.

In enacting the Trade Agreements Act of 1979 Congress specifically refused to set a *de minimis* level at which imports would be deemed too small to be legally cognizable. Instead, Congress recognized that the volume of imports that would be capable of causing material injury would vary depending upon the industry:

> It is expected in its investigation that the Commission will continue to focus on the conditions of trade, competition, and development regarding the industry concerned. For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same import volume might not be significant. S. Rep. No. 249, 96th Cong., 1st Sess. 88(1979).

Indeed, in prior steel investigations, for example, the Commission has reached a final affirmative injury determination where imports from the country under investigation had the following market shares: cold-rolled carbon steel sheet, 0.5 percent; galvanized carbon steel sheet, 0.6 percent; hot-rolled carbon steel bar, 0.8 percent; and cold-formed carbon steel bar, 1.6 percent.

Moreover, the Commission asserted in a brief to the U.S. Court of International Trade that, "in investigations involving stainless and carbon steel products, the Commission frequently has found that market penetration levels below 3 percent constitute a significant volume of imports." See Memorandum of the U.S. International Trade Commission in Response to British Steel Corporation's Motion for Review of Agency Determination Upon the Agency Record, Court No. 83-7-01040, at 8-9 (May 21, 1984). Commission practice, therefore, demonstrates both the factual and legal inappropriateness of attempting to establish a minimum 2.5 percent market penetration ratio as a statutory presumption for all cases, and particularly where steel products are involved.

In general, it is clear that any objective "benchmark" that is applied to measure "significance" would be arbitrary and capricious unless the very specific safeguards of Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980)("Benzene") were adopted. In that case, the court held that the agency must justify a presumptive standard on the basis of an adminstrative record that is amenable to judicial review. Although the Court did not necessarily reject the agency's position that it could set a standard, it emphasized that proper record support was required so that the reviewing court could assess whether the benchmark is reasonable given the statutory requisites.

The record required by Benzene to support a benchmark is not satisfied by references to "common sense" or saving federal funds. And, even if a benchmark could be substantiatd, it would be improper for the ITC to create an irrebuttable presumption that no volume of imports below a fixed number could cause material injury. The Act plainly states that the "presence or absence of any factor which the Commission is required to evaluate under subparagraph (C) or (D) shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury." 19 U.S.C. S 1677(7)(E)(ii). (Emphasis added.) Thus, even where the volume of imports is below some benchmark figure, the ITC is still required to make a case by case determination.

Until your opinion, Commissioners have respected that requirement and, while individual Members of Congress might disagree with individual Commissioners' analysis of the data in particular cases, we have thus far been able to respect the integrity of the process by which cases are decided. Your opinion casts doubt on your commitment to that process and to the law that forms the basis of the Commission's activities.

I would appreciate your informing me of the legal and economic justification for the portion of your opinion I have cited.

Sincerely,

John Heinz
United States Senator

JHbrk

cc: Chairwoman Stern
Commissioner Eckes
Commissioner Rohr
Commissioner Lodwick

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United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

February 19, 1988

Honorable Joseph A. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am writing to express my support for the nomination of Susan Liebeler to be a judge on the United States Court of Appeals for the Federal Circuit.

Ms. Liebeler has developed an exceptionally strong record during her tenure as Commissioner and Chairman of the International Trade Commission. She has pressed hard to bring added rigor to the economic analyses that the Commission must pursue if it is properly to perform its role in evaluating the propriety of import relief under our trade statutes.

While Ms. Liebeler's views have differed from those of some of her fellow Commissioners, those views have not lacked either intellectual or statutory foundation. Her opinions have demonstrated both sound logic and attention to legal requirements.

In short, as a member of the Committee that oversees the International Trade Commission, I believe that Ms. Liebeler's record on the Commission commends her for a seat on the Court of Appeals for the Federal Circuit. I urge you and your fellow Judiciary Committee members to support her confirmation.

Sincerely,

Bob

BOB PACKWOOD

cc: Judiciary Committee Members

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United States Senate
COMMITTEE ON THE BUDGET
WASHINGTON, DC 20510-6100

February 23, 1988

Honorable Joseph A. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to express my support for the nomination of Susan Liebeler to be a judge on the Court of Appeals for the Federal Circuit.

Ms. Liebeler has developed an exceptionally strong record during her tenure as Commissioner and Chairman of the International Trade Commission. While Ms. Liebeler's views have occasionally differed from those of her fellow Commissioners, those views have not lacked either statutory or intellectual foundation. Her views have demonstrated both sound logic and attention to legal requirements.

Ms. Liebeler was found to be "well qualified" by the Federal Circuit Bar Association (FCBA) which endorsed her nomination. Further, the Standing Committee on the Federal Judiciary of the American Bar Association (ABA) unanimously found her qualified for the court of appeals appointment. Finally, Ms. Liebeler's nomination has been endorsed by the ITC Trial Lawyers Association, the Association of Business Trial Lawyers, the Federal Bar Association, and the National Association of Women Judges.

Ms. Liebeler is uniquely qualified to fill the vacancy on the Federal Circuit Court of Appeals. I urge you and your fellow Judiciary Committee members to support her confirmation.

Sincerely,

Rudy

Rudy Boschwitz

RB:pcd

cc: Members of Judiciary Committee

BEFORE THE SENATE JUDICIARY COMMITTEE

TESTIMONY OF

JOHN D. GREENWALD
Wilmer, Cutler & Pickering

In Hearings on the Nomination of
Susan Wittenberg Liebeler to the
United States Court of Appeals for the Federal Circuit

November 3, 1987

My name is John D. Greenwald. I am a partner in the law firm of Wilmer, Cutler & Pickering.[1] I want to thank the Committee for the opportunity to support the nomination of Susan Liebeler to the United States Court of Appeals for the Federal Circuit.

A. Introduction

I have been engaged in the practice of international trade law for the past seven years. Before that, I was Deputy Assistant Secretary of Commerce for Import Administration (1980-1981) and Deputy General Counsel in the Office of the

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[1] The views in this testimony are my own. They are not intended to reflect in any way the views of others at Wilmer, Cutler & Pickering.

United States Trade Representative. I have known Susan Liebeler since her appointment to the United States International Trade Commission (the "ITC") and have argued numerous cases before her. In those cases, I have found her to be (1) highly intelligent, (2) very interested in the arguments of both law and fact presented by the parties, (3) probing in her own analysis of the issues of fact and law that arise in a case, and (4) committed to development of a coherent conceptual framework within which to decide the issues presented to her.

I should say at the very outset that I disagree with many of the decisions that Ms. Liebeler has reached in specific cases and with the rationale upon which those decisions are based. However, notwithstanding these differences of view, I have the greatest respect for the intellectual rigor and discipline that she brings to her decision-making. I also have the highest regard for her commitment to agency procedures that guarantee all parties have a fair chance to review the data before, and present their views effectively to, the ITC. On the basis of her performance at the ITC, I believe that Ms. Liebeler is very well-qualified for appointment to the Court of Appeals for the Federal Circuit and, indeed, has the capability to become an outstanding member of that court.

I am, of course, very much aware that Ms. Liebeler's tenure at the ITC has been controversial. Because her approach to trade law issues has often been at odds with prevailing wisdom within the trade law community, a degree of controversy was inevitable. However, the controversy that flows naturally from an unconventional approach to substantive issues has been magnified greatly by the nature of the trade law community. As you may know, the international trade law community is small, comfortable and club-like; it does not always react well to unconventional views. It would be an injustice if the Committee were to be swayed in its deliberations by an unbalanced portrayal of Ms. Liebeler's decision-making at the ITC.

The focus of the controversy over Ms. Liebeler's tenure at the ITC has been her decisions in two areas of law -- (1) determinations of material injury under Title VII of the Tariff Act of 1930 (the "Tariff Act") and (2) decisions in cases under Section 337 of the Tariff Act. I have had considerable direct experience over the past several years with the ITC in Title VII cases. While I disagree with many of Ms. Liebeler's decisions in these cases, I think that her efforts to develop a clear and coherent approach in this area of the law should be applauded. There is certainly no basis for concluding that her Title VII decisions cast doubt on her qualifiations for the bench. My experience in Section 337 cases is far more limited. However, here too I am troubled by assertions that Ms. Liebeler's approach to the law raises serious questions about her nomination.

B. Ms. Liebeler's Decision-Making in Title VII Cases

The role of the ITC in Title VII cases is to determine whether there exists material injury, or threat of material injury, by reason of dumped or subsidized imports. The statute affords the ITC the widest possible latitude in reaching such determinations. One result of this latitude has been a tendency to decide cases on an *ad hoc* basis at the expense of consistency in the application of the law. To her credit, Ms. Liebeler has struggled against this tendency; she has taken pains to develop a well-defined and clearly articulated approach to injury determinations in Title VII cases. Because of this, her opinions are coherent and consistent.

The framework that Ms. Liebeler relies upon in her decision-making reflects her own views on how the underlying purpose of the antidumping and countervailing duty laws can best be promoted. While her views of these laws and their purposes are at odds with my own views and those held by many other practitioners in the field, it is *wrong* to characterize them as contrary to the law. As an ITC Commissioner, Ms. Liebeler is bound to consider "all relevant economic factors," including several enumerated in the statute, when reviewing injury allegations in Title VII cases. However, the statute stipulates that neither the absence or presence of any factor is to "necessarily give decisive guidance." Rather, each Commissioner must determine what weight to accord each of the factors that are relevant to the determination of injury. Ms. Liebeler's decisions in Title VII cases have, in my view, been within her statutory mandate.

It is reasonable for a practitioner to insist that an ITC Commissioner approach each case on its merits and listen carefully to the arguments of fact and law advanced by the parties. In this regard, I believe that Ms. Liebeler's record has been sound. It is not reasonable to expect each Commissioner to endorse one's own interpretation of the statute. If some, or even a majority, of those engaged in trade law practice believe that the latitutde given the ITC to decide Title VII cases is excessive, they should work to amend the statute. But until that is done, they must recognize that while the statute directs the ITC to "consider" the full range of factors in determining material injury and causation, the individual ITC commissioners are, in the final analysis, given flexibility to determine which factors they believe to be relevant.

C. Ms. Liebeler's Decision-Making in Section 337 Cases

As I mentioned earlier, my experience in Section 337 cases is far less extensive than with Title VII cases. However, I would like to take issue with the assertion that Ms. Liebeler has disregarded court decisions in this area and, instead, substituted her personal views. The controversy seems to revolve around her opinion in In the Matter of Woodworking Machines, Inv. No. 337-TA-174 (May 1987). That opinion does conflict with a decision of the Court of Appeals for the Federal Circuit in Corning Glass Works v. U.S. International Trade Commission, 779 F.2d 1559 (Aug. 27, 1986). However, the ITC decision with Woodworking Machines was actually made before the Federal Circuit decided Corning Glass. While Woodworking Machines was published in May 1987, it was decided in October 1985. I understand that in cases decided after the decision of the Federal Circuit in Corning Glass, Ms. Liebeler has followed the instructions of the Court.

D. Ms. Liebeler's Commitment to Full Participation of the Parties in ITC Proceedings

A final point that I urge the Committee to take into account in considering Ms. Liebeler's nomination is her dedication to an agency decision-making process that is as open as possible. The ITC, like many other agencies of the Federal government, seems to be tempted from time to time to place constraints upon the participation of interested parties in its decison-making process. The agency could be more forthcoming in (1) providing counsel access to information under protective order and (2) explaining fully to the public the reasons for its decisions and the facts upon which its decisions rest.
Ms. Liebeler has done what she could to keep proceedings as open as possible. Her determination to provide a firm basis for

meaningful party participation in ITC proceedings should be recognized and appreciated by the Committee.

* * * * *

For these and the other reasons mentioned above, I believe that Susan Liebeler will be a welcome addition to the Federal Circuit.

STATEMENT

OF

WARREN F. SCHWARTZ
PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW SCHOOL

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON THE NOMINATION

OF

SUSAN LIEBELER
FOR
THE U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ON

NOVEMBER 3, 1987

I AM PLEASED TO SUPPORT THE NOMINATION OF CHAIRMAN SUSAN LIEBELER OF THE INTERNATIONAL TRADE COMMISSION AS A MEMBER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. IN MY OPINION CHAIRMAN LIEBELER IS EXTREMELY WELL QUALIFIED TO SERVE IN THE POSITION FOR WHICH SHE HAS BEEN DESIGNATED. SHE HAS DONE AN EXCEPTIONAL JOB IMPLEMENTING THE INTENTION OF CONGRESS UNDERLYING THE LAWS GOVERNING INTERNATIONAL TRADE.

IT MAY, PERHAPS, BE USEFUL FOR THE COMMITTEE TO KNOW SOMETHING OF MY OWN BACKGROUND AND EXPERIENCE. I AM PRESENTLY A PROFESSOR OF LAW AT GEORGETOWN UNIVERSITY LAW CENTER. I HAVE ALSO SERVED ON THE FACULTY OF A NUMBER OF OTHER LAW SCHOOLS INCLUDING YALE LAW SCHOOL, THE UNIVERSITY OF VIRGINIA AND THE UNIVERSITY OF TEXAS. I HAVE TAUGHT INTERNATIONAL TRADE LAW FOR APPROXIMATELY TWENTY YEARS, AM THE CO-AUTHOR OF A CASEBOOK ON INTERNATIONAL TRADE AND INVESTMENT AND HAVE WRITTEN SEVERAL ARTICLES IN THE FIELD. I AM ALSO THE AUTHOR OF A STUDY ON THE ADMINISTRATION OF THE ANTIDUMPING LAWS, COMMISSIONED BY THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES.

I WOULD LIKE TO FOCUS MY REMARKS TODAY ON DEMONSTRATING THAT CHAIRMAN LIEBELER'S PERFORMANCE ON THE INTERNATIONAL TRADE COMMISSION PROVIDES STRONG EVIDENCE THAT SHE WILL SERVE WITH GREAT DISTINCTION AS A MEMBER OF THE FEDERAL CIRCUIT.

AS THE MEMBERS OF THE COMMITTEE ARE AWARE, THE JURISDICTION OF THE FEDERAL CIRCUIT INCLUDES CASES WHICH ORIGINATE BEFORE THE

INTERNATIONAL TRADE COMMISSION. CHAIRMAN LIEBELER'S EXPERIENCE WITH THESE CASES IS, CONSEQUENTLY, DIRECTLY RELEVANT IN QUALIFYING HER TO DEAL WITH THESE ISSUES AS AN APPELLATE JUDGE. THE WORK OF THE COMMISSION, MOREOVER, ALSO INCLUDES CASES INVOLVING PATENTS AND TRADEMARKS, A SECOND MAJOR PORTION OF THE JURISDICTION OF THE FEDERAL CIRCUIT. MORE GENERALLY, AND MOST CRITICALLY, CHAIRMAN LIEBELER'S DUTIES WITH THE INTERNATIONAL TRADE COMMISSION HAVE INVOLVED DIFFICULT QUESTIONS OF STATUTORY INTERPRETATION, THE RESOLUTION OF COMPLEX FACTUAL ISSUES AND THE ARTICULATION OF CRITERIA WHICH ENABLE THE LAW TO BE APPLIED FAIRLY AND PREDICTABLY. THESE ARE PRECISELY THE RESPONSIBILITIES WHICH SHE WILL HAVE TO DISCHARGE AS A MEMBER OF THE FEDERAL CIRCUIT. HER PERFORMANCE ON THE COMMISSION DEMONSTRATES THAT SHE WILL DO THIS WITH GREAT DISTINCTION.

TO APPRECIATE THE EXTRAORDINARY HIGH QUALITY OF CHAIRMAN LIEBELER'S DECISIONS DURING HER SERVICE ON THE INTERNATIONAL TRADE COMMISSION, IT IS NECESSARY TO UNDERSTAND THE CRUCIAL AND DIFFICULT ROLE THE COMMISSION PLAYS IN ENFORCING THE LAWS PROTECTING AMERICAN FIRMS FROM INTERNATIONAL COMPETITION. THESE LAWS REPRESENT LIMITED AND CAREFULLY CRAFTED EXCEPTIONS TO THE PREVAILING FREE TRADE REGIME WHICH BOTH PARTIES NOW SUPPORT AS THE CENTRAL FEATURE OF AMERICAN ECONOMIC POLICY. NO ONE WISHES TO RETURN TO A WORLD DOMINATED BY PROTECTIONISM AND ECONOMIC ISOLATION.

AT THE SAME TIME, HOWEVER, IT IS RECOGNIZED, AGAIN WITH SUBSTANTIAL BI-PARTISAN AGREEMENT, THAT THERE ARE LIMITED

CIRCUMSTANCES IN WHICH IMPORTATION OF GOODS FROM FOREIGN SOURCES SHOULD BE RESTRICTED AND AMERICAN FIRMS THUS PROTECTED FROM INTERNATIONAL COMPETITION. IT HAS, HOWEVER, FOR UNDERSTANDABLE REASONS, BEEN DIFFICULT TO SPECIFY PRECISELY WHEN AMERICAN FIRMS ARE ENTITLED TO PROTECTION. CONDUCT OF FOREIGN FIRMS WHICH IS "UNFAIR" IS NOT EASY TO DISTINGUISH FROM NORMAL COMPETITION. A MULTITUDE OF FACTORS, MOREOVER, DETERMINE THE SUCCESS OR FAILURE OF A GIVEN FIRM OR INDUSTRY. WHEN AN AMERICAN INDUSTRY IS ENCOUNTERING PROBLEMS THERE IS NO EASY WAY TO SEPARATE OUT THE DELETERIOUS EFFECTS ON AMERICAN FIRMS CREATED BY CONDUCT OF FOREIGN FIRMS INTENDED TO BE COVERED BY THE TRADE LAWS AND THOSE RESULTING FROM COMPETITIVE CIRCUMSTANCES TO WHICH THOSE LAWS ARE NOT INTENDED TO APPLY.

IT IS THUS BOTH IMPORTANT AND DIFFICULT IN ENFORCING THE LAWS RESTRICTING INTERNATIONAL TRADE TO PROVIDE RELIEF WHEN IT IS JUSTIFIED AND TO DENY RELIEF WHEN IT IS NOT. FOR IT MUST BE REMEMBERED THAT THE IMPROPER GRANT OF RELIEF HARMS AMERICAN CONSUMERS BY DENYING THEM THE OPPORTUNITY TO PURCHASE GOODS FROM ABROAD WHICH, BY REASON OF PRICE OR QUALITY, THEY PREFER TO THOSE AVAILABLE FROM DOMESTIC SOURCES.

NOT UNEXPECTEDLY, WHEN RELIEF IS DENIED, THOSE WHO HAVE SOUGHT IT ARE ANGRY AND DISAPPOINTED. THE INTENSITY OF THEIR CRITICISM OF THE DECISION DENYING RELIEF SHOULD NOT, HOWEVER, BE TAKEN TO DEMONSTRATE THAT GRANTING RELIEF WAS THE RESULT INTENDED BY THE CONGRESS. PROTECTIONIST RHETORIC BY INDIVIDUAL MEMBERS OF

CONGRESS FREQUENTLY GOES WELL BEYOND THE LEGISLATION ACTUALLY ENACTED.

ALL OF THIS IS NECESSARY PRELUDE TO A PROPER APPRECIATION OF CHAIRMAN LIEBELER'S ROLE ON THE INTERNATIONAL TRADE COMMISSION. THE KEY POINT IN UNDERSTANDING THAT ROLE IS THAT CHAIRMAN LIEBELER'S DECISIONS HAVE REPRESENTED AN ABSOLUTELY ESSENTIAL ELEMENT IN THE PROPER CARRYING OUT OF THE WILL OF CONGRESS. FOR WHAT SHE HAS DONE, WITH DEDICATION AND, GREAT SKILL, IS TO CONFRONT THE INEVITABLE AMBIGUITIES IN LEGISLATION WHICH RESULT WHEN CONGRESS ADDRESSES A COMPLEX SUBJECT IN WHICH IT TRIES TO STRIKE A DELICATE BALANCE BETWEEN COMPETING CONCERNS. INTERNATIONAL TRADE LEGISLATION IS NOT, AND CANNOT BE, A VEHICLE FOR ENACTING ABSTRACT NOTIONS OF FREE TRADE OR PROTECTION. RATHER, IT REPRESENTS A SERIES OF SUBTLE AND COMPLEX COMPROMISES BETWEEN THESE EXTREMES.

THE ROLE OF THE ADMINISTRATIVE OFFICIAL COMMITTED TO ENFORCING THE WILL OF CONGRESS IS NOT TO DENY OR OBSCURE THESE COMPLEXITIES BUT RATHER TO TAKE THEM INTO ACCOUNT IN DECIDING CONCRETE CASES. IF THIS IS DONE THE PURPOSES OF CONGRESS WILL BETTER BE SERVED AND THE ONGOING DIALOGUE BETWEEN THE CONGRESS AND THE AGENCY FACILITATED BY THE CLEAR STATEMENT OF WHAT THE ADMINISTRATOR IS DOING AND WHY IT IS BEING DONE.

CHAIRMAN LIEBELER HAS DISCHARGED THIS FUNCTION WITH GREAT DISTINCTION. HER OPINIONS IDENTIFY THE LEGAL AND FACTUAL ISSUES WHICH MUST BE RESOLVED, WITH COMPLETE CANDOR STATE WHY THOSE

ISSUES ARE RESOLVED AS THEY ARE AND PROVIDE CLEAR GUIDANCE TO ENSURE FAIR AND PREDICTABLE APPLICATION OF THE LAW TO FUTURE CASES.

IT IS EXACTLY THIS LAWYER-LIKE CRAFT WHICH CONSTITUTES THE ESSENTIAL FEATURE OF GOOD JUDICIAL DECISIONS AND OPINIONS. I AM CONFIDENT, CONSEQUENTLY THAT THESE QUALITIES EVIDENCED IN CHAIRMAN LIEBELER'S DECISIONS WILL BE BROUGHT TO BEAR IN HER ROLE AS A MEMBER OF THE FEDERAL CIRCUIT. SHE WILL BE A VERY GOOD JUDGE. I URGE HER CONFIRMATION.

BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

STATEMENT OF

RICHARD O. CUNNINGHAM
Steptoe & Johnson

In Support of the Nomination of
Susan W. Liebeler
to the U.S. Court of Appeals for the Federal Circuit

I am a partner in the law firm of Steptoe & Johnson, where I have for the past 19 years been engaged primarily in the practice of international trade law. I currently serve in the American Bar Association as a member of the Standing Committee on Customs Law and as Vice Chairman (for Antidumping & Countervailing Duties) of the Committee on Customs Law of the Administrative Law Section. In the Section of Litigation, I am a past Chairman of the Committee on International Litigation and current Chairman of the Committee on Legislation. The views set forth herein, of course, are my own and do not purport to represent the views of my firm, of any bar group, or of any clients I have represented.

In the course of my practice, I have appeared frequently before the International Trade Commission during Ms. Liebeler's tenure as Commissioner, Vice-Chairman and Chairman. These appearances have involved representations of U.S. petitioner companies and industries, U.S. importing companies and foreign exporting companies in cases under the antidumping and countervailing duty laws and under Section 201 of the Trade Act of 1974 (the "escape clause"). I have also been involved in cases under Section 337 of the Tariff Act during Commissioner Liebeler's tenure, although my role did not happen to involve an appearance before the Commission. I regularly review the published decisions of the Commission under all of the trade laws.

My experience in appearing before Commissioner Liebeler, together with my continuing review of her opinions, enable me to state unequivocally that Susan Liebeler has the intellect, character and judicial temperament to be an exceptionally fine appellate judge. Moreover, she will bring to that court experience in international trade law issues and familiarity with the economic analyses utilized in international trade cases at the administrative level -- capabilities that will be invaluable to the Court of Appeals for the Federal Circuit over the next decade, as international trade cases increase as a percentage of the Court's workload.

In reviewing other testimony and submissions to this Committee, I am frankly astonished that questions have been raised that purport to be directed at Commissioner Liebeler's "impartiality" or "judicial temperament." I want to assure the Committee that I have always known Commissioner Liebeler to be scrupulously impartial, both in her decision-making and in her conduct of hearings. Moreover, she has never to my knowledge ignored statutory provisions or the directives of the Court of International Trade or the Federal Circuit. Even where I have differed with her conclusions -- a phenomenon which has occurred primarily in cases where I have been on the losing side -- my disagreements have related either to points of factual analysis or to legal issues on which the statutes or court decisions leave room for legitimate differences in interpretation.

On the latter point, I must confess that I find the "Report" submitted by the Board of Directors of the Customs and International Trade Bar Association to be especially misleading. Even putting aside CITBA's spurious Section 337 complaints -- which, as Mr. Greenwald's testimony demonstrates at pages 5-6, are predicated on a misstatement by CITBA of the date of Commissioner Liebeler's opinion -- the Association's analysis of Commissioner Liebeler's opinions shows a rather fundamental misunderstanding as to how the trade laws work. In these statutes, Congress has set out rather general criteria, and in some cases has given a non-exclusive list of economic factors for the Commission to consider. Within those statutory frameworks, however, the Commissioners have great flexibility as to the methodologies by which they may properly analyze the economic facts of a given case. Moreover, both the statutes and their legislative history make it clear that the Commissioners are not limited to consideration of statutorily-enumerated economic factors, but rather they should consider all other economic factors relevant to the case at hand.

CITBA's attack on Commissioner Liebeler's trade case opinions shows, upon even the most cursory examination, no instance in which she has disregarded statutory criteria or statutorily-enumerated economic factors. Rather, each instance cited by CITBA boils down to either (a) consideration by Commissioner

Liebeler of other relevant economic facts not specifically enumerated in the statute, or (b) a case in which the Commissioner considered a statutorily-enumerated economic factor, but reached a factual conclusion as to that factor different than the conclusion CITBA would have reached. In short, Commissioner Liebeler scrupulously adhered to the statute, but weighed the evidence differently than CITBA seems to have wanted.

It must be remembered that these statutes are replete with such terms as "significant" and "material". Over the years, individual Commissioners have had widely varying assessments of what is "significant" and what is "material". Some Commissioners have been prone to find "significant" a relatively low quantum of import volume or price effect, while other Commissioners have required a stronger showing. Such variances are inherent in the nature of the Commission's fact-analyzing role, and there is nothing injudicious in that. It seems clear that all of CITBA's concerns about Commissioner Liebeler relate to her position on this wholly permissible spectrum of economic fact analysis. Not only are these concerns irrelevant to issues of "impartiality" or "judicial temperament", they are wholly irrelevant to Ms. Liebeler's present nomination. On the Court of Appeals, she will be ruling on issues of law, not weighing the facts.

Finally, I must express genuine alarm at that portion of the CITBA paper (at pages 3-5) that purports to quote largely derogatory remarks by an unstated number of people whom the CITBA Board claims to have "interviewed". None of the interviewees is named. In no instance is the quoted remark put in any context. We are not even given the question to which any given remark responded. This denies Commissioner Liebeler even the rudiments of fair play. One has to go back to hearings in the early 1950s by a very different Senate Committee to find a submission that stoops to such a level.

The fact is that Susan Liebeler is eminently qualified to serve on the Court of Appeals for the Federal Circuit. She will bring to that Court intelligence, international trade law experience, fairness and impartiality. I urge that she be confirmed.

July 21, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the millions of workers comprising the membership of the United Auto Workers, Amalgamated Clothing and Textile Workers Union, International Union of Electronic and Electrical Workers, International Ladies' Garment Workers Union, United Mine Workers and the United Steelworkers of America, we are writing to express our deep concern over the nomination of Susan W. Liebeler, Chairwoman of the International Trade Commission, to the Court of Appeals for the Federal Circuit. In reviewing her qualifications for this important appointment, we respectfully request that you consider that Chairwoman Liebeler has evidenced an unmistakable tendency to depart from the statutory mandates she is sworn to administer in her role as Chairwoman of the Commission. These departures raise serious questions concerning Chairwoman Liebeler's fitness to serve as a member of the Court that has been conferred appellate jurisdiction over most international trade cases.

As you know, organized labor has fought long and hard to ensure that a statutory structure is in place which is responsive to the needs of domestic industries that have suffered injury at the hands of unfair import competition. That structure calls for a careful review of tangible economic data that permits a reasonable analysis of the current and future health of an industry adversely affected by imports. The data upon which such an analysis is based includes information on import trends, production, employment, profitability, pricing, and investment. The analysis called for by the statute is rigorous, yet fair. More importantly, it establishes a transparent framework within which a petitioning industry can determine whether import relief is a reasonable possibility.

We are deeply concerned that, during her tenure on the Commission, Chairwoman Liebeler has completely ignored this framework. Instead, she has established an analytical structure of her own that bears no relationship to existing law. Moreover, in virtually every instance, her framework results in a vote against import relief and therefore against domestic industries and their workers. Among the elements of Chairwoman Liebeler's analytical framework are the following:

1. The substitution of theoretical econometric models and proxies for direct injury analysis. In most instances, this approach serves no function but to provide post-hoc rationalizations for negative determinations.

2. The establishment of a five part test, which has as its basis the assumption that price undercutting by unfairly traded imports must be predatory in order to be injurious. See, e.g. Certain Red Raspberries from Canada, Inv. No. 731-TA-196, USITC Pub. 1707 (1985) at 11-18. This assumption has no basis in law and, in fact, departs from almost two decades of Commission precedent.

3. The establishment of a presumption that imports cannot be a cause of material injury if the import penetration level is below a particular threshold. *See, e.g. Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, Inv. Nos. 701-TA-242 and 731-TA-252 and 253 (Prelim.), USITC Pub. 1680 (1985) at 19-30. Such a presumption is without statutory basis and is contrary to long-standing Commission precedent.

Chairwoman Liebeler's theories have so departed from congressional intent that they have elicited criticism not only from her colleagues on the Commission (*see, e.g. Certain Ethyl Alcohol from Brazil*, Inv. Nos. 701-TA-239 and 731-TA-248, USITC Pub. 1818 (1986) at 40-53), but from the Congress as well. The enclosed letter from Senator Heinz, who is among the most knowledgeable members of the Senate when it comes to the administration of our international trade laws, is indicative of this criticism. Moreover, it generally reflects the concerns we share with respect to Chairwoman Liebeler's qualifications to sit on the federal bench and, in particular, on the Court that will review decisions arising out of the very laws Chairwoman Liebeler has repeatedly ignored.

In sum, Chairwoman Liebeler has evidenced a pattern of decision making, the tenor of which has little foundation in applicable law. Her independent course as a Commissioner leads us to question seriously whether she could be faithful to that body of law were she to be granted the responsibility of appellate court judge.

We ask you to consider these factors carefully in the course of your review. The long term future of a fair and equitable international trade policy by the United States may hinge on your determination.

Sincerely,

Owen Bieber
Owen Bieber, President
United Auto Workers

Jack Sheinkman
Jack Sheinkman, President
Amalgamated Clothing & Textile
Workers Union

William H. Bywater
William Bywater, President
International Union of Electronic
and Electrical Workers

Jay Mazur, President
International Ladies' Garment
Workers Union

Richard Trumka
Richard Trumka, President
United Mine Workers

Lynn R. Williams
Lynn Williams, President
United Steelworkers of America

c: Members of the Judiciary Committee

C/S/E/

MARY K. ALEXANDER
Director, Trade Policy

ITIZENS FOR A SOUND ECONOMY / 122 C Street NW
Suite 700
Washington, DC 20001
(202)638-1401

August 4, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I understand that on August 6, 1987 the Committee intends to hold a nomination hearing on Susan Liebeler to be a judge for the U.S. Court of Appeals for the Federal Circuit.

As Director of the Trade Project for Citizens for a Sound Economy, a 250,000 member, grassroots supported public policy organization, I have followed Ms. Liebeler's career since she was first nominated to be a commissioner with the International Trade Commission. Her political independence, her strong belief in using sound economic analysis when making economic judgments, and her preference for reasoned thinking over impassioned rhetorical arguments are all important qualities that should be taken into account during her nomination hearing.

I would be pleased to comment at her nomination hearing on her excellent record at the International Trade Commission.

Sincerely,

Mary K. Alexander

Mary K. Alexander
Director, Trade Project

American Iron and Steel Institute

1000 16th Street, N.W., Washington, D.C. 20036

Milton Deaver
President
(202) 452-7146

OUR NEW ADDRESS
AMERICAN IRON AND STEEL INSTITUTE
1133 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2701

February 15, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
489 Senate Russell Office Building
Washington, D. C. 20510-0802

Dear Mr. Chairman:

The American Iron and Steel Institute, on behalf of its domestic member companies, writes to express its grave concern about the nomination of Susan M. Liebler, Chairman of the International Trade Commission ("ITC"), to the United States Court of Appeals for the Federal Circuit. We understand your Judiciary Committee is likely to consider this nomination as early as this week.

The domestic steel industry is intimately familiar with Mrs. Liebler's activities at the ITC, having filed numerous trade cases over the years in response to what the President and the Congress have acknowledged to be pervasive unfair trade practices. It is from this close association with Mrs. Liebler's activities at the ITC that our concern arises.

The Congress has painstakingly established statutory criteria for the ITC to follow in making its determinations. Unfortunately, in our opinion Mrs. Liebler has consciously discarded these congressionally mandated tests and substituted an analysis based on her own highly subjective criteria. In so doing, in our judgment, she has lost the objectivity that is required of a federal judge.

The AISI is by no means alone in concluding that Mrs. Liebler has chosen to substitute her own notions for the directives of Congress. In Certain Ethyl Alcohol from Brazil, Inv. Nos. 701-TA-239 and 731-TA-248, USITC Pub. 1818 (1986), fellow ITC Commissioner Eckes delivered a scathing denunciation of Mrs. Liebler's disregard of the statutory framework:

> From my perspective this case elevates to prominence a fundamental legal issue relating to how the Commission applies the statutory criteria in our trade laws. At issue here is whether members of the Commission have the discretion to disregard explicit statutory criteria and substitute their own presumptions and tests in administering our trade laws. Or must the Commission apply the law as it is written, even though individual Commissioners may disagree personally with the trade laws and the intent of Congress?

* * *

> ...(T)he net effect of some of my colleagues' reasoning has been to discard the carefully crafted statutory tests and to revise the law by administrative fiat. In my view, the Commission's statutory findings cannot and should not be made by improvising a host of dubious, arbitrary, and illegitimate analytical techniques, such as "proxies," "presumptive tests," and "elasticities," to rationalize negative determinations. The statute is generally clear, and those of us charged with administering it have no business substituting academic fictions for the factual record and our own judgment.
>
> Since the Trade Agreement of 1979 was implemented, most Commissioners have tried to administer our trade laws with fairness and impartiality. From time to time, our reviewing courts may have disagreed with individual Commission decisions, but the Commissioners generally have worked diligently and in a nonpartisan manner to apply the law as it was written by Congress. And from this sensitivity to statutory construction and legislative intent has emerged an extensive corpus of case law that establishes a transparent framework for the predictable administration of our trade laws.
>
> To me the new revisionism is a threat to the fairness, predictability, and integrity of our trade law system. In devising substitutes for the statute, the revisionists offer the parties only proxies, presumptions and abstractions, not the certainty of consistent statutory interpretation. Parties -- both domestic and foreign -- cannot be sure what factors will be dispositive when statutory standards are explained away, bent, or simply disregarded.

More recently, the Senate Finance Committee's Report on the Omnibus Trade Act of 1987, S. Rep. No. 100-71, sharply criticized (at 115-16) Mrs. Liebler's rejection of legislative directives:

> The changes which the Committee has approved to section 717(7)(B)(C) are generally clarifications of current law and of original congressional intent with respect to current law. These changes are believed necessary because certain Commissioners may not be applying the law in accordance with Congressional intent.

* * *

> The Committee is of the view that the determination of material injury must be made on a case-by-case basis, by applying the enumerated statutory factors in the particular circumstances of the industry under investigation. The Committee

> disapproved of determinations by individual Commissioners that rely upon the mechanical application of factors or formulas that remain constant from case to case, but are not enumerated in section 717(7).[1]

AISI joins individual Members of Congress, the United Steelworkers of America, the United Auto Workers, the Amalgamated Clothing and Textile Workers Union, the International Union of Electronic and Electrical Workers, the International Ladies' Garment Workers Union, the United Mine Workers and the Customs and International Trade Bar Association in urging that Mrs. Liebler not be confirmed as a member of the Court of Appeals for the Federal Circuit.[2]

Very truly yours,

Milton Deaner

Milton Deaner

cc: Members of the Senate Judiciary Committee
Members of the Senate Steel Caucus

---

[1] That same report proceeds specifically to reject the basis of Mrs. Liebler's reasoning -- namely, that the antidumping and countervailing duty laws were intended only to cover instances of predatory pricing -- as well as several of her individual criteria (at 116)

[2] For convenience, copies of views of these individuals and groups, as well as the full text of relevant pages of S.Rep.No. 100-71, are attached.

NATIONAL WOMEN'S ECONOMIC ALLIANCE FOUNDATION

1440 NEW YORK AVENUE, NW • SUITE 300 • WASHINGTON, DC 20005 • 202 393-5257 PATRICIA S. HARRISON, PRESIDENT

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Louise G. Wheeler
Chief, Private Sector Committees
United States Information Agency

Gail Winslow
Vice Chairman
Ferris & Company

February 22, 1988

The Honorable Joseph R. Biden
246 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Biden:

As President of the National Women's Economic Alliance, a nonpartisan organization comprising men and women leaders from business, industry and government who work together to increase economic and career opportunities for women, I welcome the opportunity to support the confirmation of Susan Liebeler, nominee for the U.S. Court of Appeals for the Federal Circuit.

Mrs. Liebeler's judicial experience and professional achievements are outstanding and she has been endorsed by her peers, by mentors, by professional organizations. She is more than qualified, and if integrity, ability and judicial capacity count -- she should be confirmed.

Her confirmation will telegraph an important message to women and all citizens, Democrats and Republicans: that our elected officials are committed to encouraging and affirming the contribution of the best and the brightest; that leadership, whether demonstrated by women or Blacks or Hispanics, is a quality that government needs in quantity.

Susan Liebeler has an important contribution to make as a judge on the federal bench. She has made a commitment to serve and has gone through the process of confirmation, confident that while it may be long and arduous, it is thoughtful, fair and unbiased.

We applaud her commitment and her courage and thank you for the opportunity to express our support for this exceptional person.

Sincerely,

Pat Harrison

PSH:jlm:4026w

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION
ACTWU
AFL-CIO, CLC
815 SIXTEENTH ST., N.W. • WASHINGTON, D.C. 20006
(202) 628-0214

JACK SHEINKMAN
President

CHARLES SALLEE
Secretary-Treasurer

ARTHUR LOEVY
Executive Vice President

ELIZABETH M. SMITH, Director
Legislative and Political Department

February 22, 1988

Dear Senator:

The Judiciary Committee will soon consider the nomination of Susan W. Liebler, Chairwoman of the International Trade Commission, to the Court of Appeals for the Federal Circuit. On behalf of the 284,000 members of the Amalgamated Clothing and Textile Workers Union, I urge you to oppose Chairwoman Leibler's nomination.

The labor movement has worked with the Congress for many years to establish a statutory framework which responds to the legitimate needs of American industries injured by unfair trade. However, during her service on the International Trade Commission, Chairwoman Liebler has repeatedly ignored this statutory framework, substituting her own ideological criteria to justify voting against import relief for American industries and workers.

Chairwoman Liebler's ideological approach to trade issues, plus her gross insensitivity to the plight of unemployed workers, demonstrates a serious lack of judicial temperament. Her tendency to ignore the law as expressed by the Congress and the courts raises serious doubts about her fitness to serve on the court with appellate jurisdiction over most international trade cases.

Again, I urge you to oppose Chairwoman Liebler's nomination to the Court of Appeals for the Federal Circuit.

Sincerely,

Elizabeth M. Smith
Legislative & Political Director

INTERNATIONAL TRADE COMMISSION CHAIRMAN
SUSAN LIEBELER

Nominated to the United States Court of Appeals For The Federal Circuit

Letters of Support

Letter From:	Directed To:	Date
Arnwine, Jean M., Esq., Los Angeles	Hon. Joseph Biden	Nov. 4, 1987
Baker, Jonathan B., Asst. Professor of Business Administration, The Amos Tuck School of Business Administration, Dartmouth College	Hon. Joseph Biden	July 24, 1987
Bierman, James N., Esq., Washington, D.C.	Hon. Joseph Biden	July 29, 1987
Boltz, Howard O., Jr., Rogers & Wells, Los Angeles, President of the Association of Business Trial Lawyers	Hon. Strom Thurmond	July 31, 1987
Bruinsma, Theo. A., Former Dean, Loyola Law School, President, University Technology Transfer, Inc.	Hon. Joseph Biden	Oct. 30, 1987
Dam, Kenneth W., Esq. Vice President, Law and External Relations, IBM Corporation; Former U.S. Deputy Secretary of State; Former Professor of International Law and Provost, University of Chicago.	Hon. Joseph Biden Hon. Strom Thurmond	Nov. 2, 1987
Davidson, Janet T., Esq., Paul, Hastings, Janofsky & Walker, Los Angeles	Hon. Joseph Biden	Nov. 4, 1987
de Ravel D'Esclapon, Pierre F., Atty. at Law, Donovan Leisure Newton & Irvine, New York	Hon. Joseph Biden	July 31, 1987

Feldman, Larry R., Atty. at Law, Fogel, Feldman, Ostrov, Ringler & Klevens, Los Angeles. President of the Los Angeles County Bar Association and Past President of the Los Angeles Trial Lawyers Assn.	Hon. Joseph Biden	July 13, 1987
Ferris, Raymond W., Executive Vice Pres., Strategic Planning, Mattel Inc.	Hon. Joseph Biden	Nov. 3, 1987
Fields, D. Annette, Esq., Debevoise & Plimpton, Washington, D.C.	Hon. Joseph Biden	Nov. 5, 1987
Fisher, Stanley M., President Federal Bar Association	Hon. Joseph Biden	Mar. 24, 1987
Fiske, Robert B., Jr., Chairman, American Bar Association	Hon. Joseph Biden	Mar. 25, 1987
Group of Individuals Concerned with Trade Policy	Hon. Susan Liebeler	Aug. 7, 1986
Herman, Dean B., Esq., Ervin, Cohen & Jessup, Beverly Hills, California	Hon. Joseph Biden	Nov. 4, 1987
Kipps, Clarence T., Chairman, Judicial Selection Committee, The Federal Circuit Bar Assn	Hon. Joseph Biden	July 27, 1987
Lewin, Travis H.D., Interim Dean, Syracuse University College of Law	Hon. Joseph Biden	Oct. 20, 1987
Lind, Katherine A., Deputy County Counsel for the County of Riverside, State of California	Hon. Joseph Biden	Nov. 4, 1987
Lipman, Steven E., Chairman, Judicial Selection Comm. ITC Trial Lawyers Assn.	Steve Metalitz, Esq., Special Counsel, Committee on the Judiciary	Aug. 4, 1987
	Hon. Strom Thurmond	Aug. 4, 1987
	Hon. Edwin Meese, Attorney General	Apr. 24, 1987

Masada, Linda S., Esq., Fierstein & Sturman, Los Angeles	Hon. Joseph Biden	Nov. 4, 1987
McChesney, Fred S., Visiting Professor, The University of Chicago	Hon. Joseph Biden	Oct. 28, 1987
McConnell, Judith, President-elect, Nat'l Assn. of Women Judges	Hon. Joseph Biden	July 15, 1987
McDermott, John T. Professor, Loyola Law School	Hon. Joseph Biden	Oct. 29, 1987
Pancione, Peter R., Esq. Gipson, Hoffman & Pancione, Los Angeles	Hon. Joseph Biden	Nov. 3, 1987
Prager, Susan Westerburg, Dean, UCLA School of Law	Hon. Joseph Biden	July 13, 1987
Price, Monroe E., Dean, Benjamin N. Cardozo School of Law, Yeshiva University	Hon. Joseph Biden	Oct. 12, 1987
Rothschild, Loren R., Past President of the Los Angeles Association of Business Trial Lawyers; Chairman of the Los Angeles County Bar's Committee on Court Reform and of the ad hoc Committee on Court Financing, and member of the Los Angeles County Judicial Procedures Commission	Hon. Joseph Biden	Oct. 12, 1987
Schaumberg, Tom M., Esq. Howrey & Simon, Washington, D.C.	Hon. Strom Thurmond	Aug. 4, 1987
Schulze, Dick, Member of Congress, 5th Dist., Pa.	Hon. Joseph Biden	Aug. 3, 1987
Shad, John, Ambassador, The Hague	Hon. Joseph Biden	Sept. 4, 1987
Stamm, Alan, Esq., O'Donnell & Gordon Los Angeles	Hon. Joseph Biden	July 31, 1987

Sykes, Alan O., Esq., Asst. Prof. of Law, The University of Chicago	Hon. Joseph Biden	Aug. 11, 1987
Tonner, Grace C., Esq. Professor of Law, Loyola Law School	Hon. Joseph Biden	Nov. 4, 1987
unick, David C., Professor of Law, Loyola Law School	Members of the Judiciary Committee	Oct. 30, 1987
Wallick, Robt. D., President, The Federal Circuit Bar Assn.	Hon. Joseph Biden	Apr. 1, 1987
Weiss, Barry R., Esq. Pepper, Hamilton, & Scheetz, Los Angeles	Hon. Joseph Biden	Nov. 4, 1987
Wood, Diane P., Asst. Professor of Law The University of Chicago	Hon Joseph Biden	Oct. 28, 1987

0989p

Fifteenth Floor
400 South Hope Street
Los Angeles 90071-2899

November 4, 1987

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office
Washington, D.C. 20510

Re: Susan Liebeler

Dear Mr. Chairman:

I am writing in support of Susan Liebeler who has been nominated and is under consideration for appointment to the United States Court of Appeals.

Ms. Liebeler had a major influence on my career as a law student at Loyola Law School in Los Angeles. I met her at the end of my first year when I interviewed to be a research assistant for her during the summer of 1979. As I had heard she was a highly demanding professor I felt somewhat intimidated before the interview. After the interview, however, I realized that, although her standards were high and the work would be challenging, she would provide the supportive guidance necessary for me to carry out the work. She lived up to my expectations by treating me as a full member of her team.

During my second year in law school I took her corporations law class, even though her section was reputedly the most difficult and her "grading curve" very strict. Former students had convinced me that her class was measurably better in substance than others offered. Ms. Liebeler did not teach corporations law solely from the casebook or the statutes but from the perspective of one who had to deal with those in the business world. Hence the classes were not cut-and-dried but forced thought and consideration of real-world alternatives. What I learned has served me well as a corporate lawyer rather than simply providing pat answers to bar examination questions.

Ms. Liebeler encouraged me and many other students to apply for judicial clerkships. As the person in charge of clerkships, she helped each of us to emphasize our strengths in our applications and was extraordinarily supportive to us in dealing with rejections and helping us to decide between equally attractive offers.

During my years at Loyola, Ms. Liebeler was an active supporter of law review staff members, often stopping by the office to ask whether she could help in any way. She provided us with insights on how to deal with articles, authors, or subject matter. From my perspective, she was well liked and respected by the law review staff and a good resource for us.

Because of Ms. Liebeler's high standards, some at Loyola shied away from her and did not seek her help and support for fear of not living up to her expectations. I might have been among them had it not been for my first interview with her when I recognized her patience, tolerance, and dedication to Loyola and its students, and her eagerness to work with me to achieve a high quality product and at the same time expand my horizons.

Although Ms. Liebeler and I were not always in agreement on political or socio-economic issues, this did not prevent her from being friendly and supportive. As a result, I enjoyed working with her and developed a continuing liking for her and respect for her intellectual abilities, judgment, and dedication to the law. I therefore support her nomination to the United States Court of Appeals.

Very truly yours,

Jean M. Arnwine

Jean M. Arnwine

JMA:abh

The Amos Tuck School of Business Administration
DARTMOUTH COLLEGE • HANOVER • NEW HAMPSHIRE • 03755
TELEPHONE: (603) 646-2369

July 24, 1987

Honorable Joseph Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Biden:

I am writing in support of the nomination of Chairman Susan Liebeler to the Federal Circuit. My knowledge of her qualifications comes from having litigated before the U.S. International Trade Commission. I have been impressed with Chairman Liebeler's performance at the I.T.C. In my experience, she exhibits a deep understanding of complex legal and policy questions, and writes carefully reasoned decisions. These attributes, along with Chairman Liebeler's considered views on the importance of protecting property rights as an incentive for economic growth, will allow her to serve the country well on the Federal Circuit, which deals in large part with upholding trademark, copyright, and patent laws.

I might add parenthetically that I do not believe that Chairman Liebeler's confirmation should become a partisan issue. I consider myself a liberal Democrat, and I volunteered in Lawyers for Mondale. Were I on the Judiciary Committee, I would vote against many of President Reagan's judicial appointments. However, I would vote to confirm Chairman Liebeler, and I hope that the Committee does the same.

Sincerely yours,

Jonathan B. Baker
Assistant Professor of
Business Administration

JBB:ss

JAMES N. BIERMAN
1775 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006

July 29, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am writing to urge the confirmation of Susan W. Liebeler to the Court of Appeals for the Federal Circuit. Although I imagine that Ms. Liebeler and I would disagree politically--I still consider myself a liberal Democrat--I have always found her fair and impartial as a member of the International Trade Commission.

I understand that there are those who feel her nomination is a controversial one because of some of her Commission decisions, but I believe any such controversy really says more about the makeup of the ITC than about Chairman Liebeler. That is, she stands out as an excellent lawyer among Commission members who are not trained in the law. Most of them want rather simplistic solutions to what are difficult statutory questions and, accordingly, seem to castigate her for not being willing to give the easy answer.

In the case I litigated before her, In re Certain Alkaline Batteries, Susan Liebeler's concurring decision was clearly most lucid, logical and well thought out. Even though the other Commissioners also ruled in my client's favor on the law of the case, it was her reasoning that made best sense from a statutory and regulatory point of view. Moreover, it could hardly be called an "ideological" decision as it went against the wishes of the Administration. She simply bit the bullet and applied the law in a sensible manner--something that judges have to do regardless of the political consequences.

The Honorable Joseph R. Biden, Jr.
July 29, 1987
Page Two

In essence, then, I believe Ms. Liebeler would make an excellent judge on the Court of Appeals for the Federal Circuit. It is there that she can best apply her legal talents, and I am, accordingly, pleased to support her confirmation.

Sincerely,

Jim Bierman

JNB:ddk

bcc: Michael S. Knoll, Esq.

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July 31, 1987

Hon. Strom Thurmond
United States Senate
139 Dirksen Senate Office Building
Washington, D. C. 20510

Re: Nomination of Susan Liebeler
United States Court of Appeals
for the Federal Circuit

Dear Senator:

I am President of the Association of Business Trial Lawyers, Vice President of the Federal Bar Association (Los Angeles Chapter) and a partner in the law firm of Rogers & Wells.

I strongly urge the nomination and approval of Susan Liebeler to the United States Court of Appeals for the Federal Circuit based upon her outstanding record as a lawyer, professor, author and Commissioner for the United States International Trade Commission.

The range of Ms. Liebeler's experience with the complex issues presented to the Federal Circuit amply qualify her for appointment to the Court of Appeals. Her reputation is so firmly established among lawyers and judges that her appointment should be without controversy. The Court of Appeals will be fortunate to have such a talented and astute addition to its bench.

Very truly yours,

H O. Boltz Jr.
HOWARD O. BOLTZ, JR.

University Technology Transfer, Inc.

UTI

October 30, 1987

The Honorable Strom Thurmond
United States Senator
139 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Susan Liebeler -- Appointment to Court of Appeals for the Federal Circuit

Dear Senator:

I understand that Susan Liebeler, Chairman of the U.S. International Trade Commission, will soon be making an appearance before the Committee on the Judiciary. I am writing to express my support for her nomination based on a long acquaintance with Chairman Liebeler. Of specific relevance was my professional realtionship with her during a two and one-half period when I served as Dean of Loyola Law School in Los Angeles.

Susan had the academic respect of her colleagues and was recognized as an important member of the faculty. That experience, plus the exercise of her responsibilities with the Trade Commission, prove her to be a person of good judgment and possessive of a temperment which would well serve the Court of Appeals. She retains the support and confidence of an impressive list of supporters from within and without the legal community.

I know that Senator Wilson from her home state of California supports Susan Liebeler's nomination, and I would like to strongly express my support as well.

Sincerely,

Ted A. Bruinsma

Theo. A. Bruinsma
President

2790 Skypark Drive, Suite 209, Torrance, CA 90505 213/539-4786

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PMS LAURA NELSON DEPARTMENT OF JUSTICE RPT DLY MGM, DLR
OFFICE OF LEGISLATIVE AFFAIRS ROOM 1141 10 AND CONSTITUTIONS AVES
WASHINGTON DC 20530
THE FOLLOWING IS A COPY OF THE MESSAGE SENT TO SENATOR JOSEPH R BIDEN JR AND SENATOR STROM THURMOND

I SHOULD LIKE TO URGE CONFIRMATION OF SUSAN W LIEBELER AS A JUDGE ON THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT. I HAVE KNOWN HER FOR OVER 15 YEARS AND HAVE THE HIGHEST REGARD FOR HER PROFESSIONAL COMPETENCE. SHE IS A HIGHLY ABLE LAWYER WITH NOT ONLY A BROAD BACKGROUND BUT ALSO EXPERTISE IN THE SUBJECT MATTER OF THE COURT IN QUESTION. I CANNOT THINK OF ANYONE BETTER QUALIFIED AS A LAWYER FOR THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

KENNETH W DAM
10 HOLLY BRANCH RD
KATONAH NY 10536

1438 EST

1446 EST

EVFCH WSH

Time: 19:54 11/02/87 ???
Connect Time : 127 seconds

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November 4, 1987

OUR FILE NO

The Honorable Joseph Biden, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing to you in support of the nomination of Susan Liebeler to the United States Court of Appeals for the Federal Circuit. I have known Susan Liebeler since 1975 as her student, colleague and friend and believe she would be a strong and valuable addition to the Court.

I first met Susan Liebeler when I applied for a job as her research assistant following my first year as a student at Loyola Law School. At the time she was teaching Corporations and Securities Regulations neither of which courses I had yet taken. Nonetheless, she agreed to give me a chance. I worked hard and learned much from her and appreciated the care and attention she showed me.

Subsequently, I was a student in her Corporations I and Corporations II classes. She was an excellent teacher who focused on why the laws and judicial interpretations were as they were rather than merely what they were. She expected a great deal from her students and that expectation resulted in a prepared classroom. It was difficult to get away with much in her classes and her students really mastered the subject matter.

Senator Joseph Biden
November 4, 1987
Page Two

Susan Liebeler took an active interest in her students and was instrumental in establishing a clerkship program which both encouraged good students to seek judicial clerkships following graduation and convinced judges that Loyola Law School students were serious candidates. She also took an active interest in the Law Review as its proponent to both students and the Law School.

In sum, Susan Liebeler was respected by her students and colleagues on the faculty and served Loyola Law School well. She was strong in her views but kept an open mind. I have kept close touch with her since my graduation and have watched her career outside academia develop. I have every reason to believe that she would serve our judicial system well if appointed to the Court and I heartily support such appointment.

Very truly yours,

Janet T. Davidson
for PAUL, HASTINGS, JANOFSKY & WALKER

JTD:ah

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WRITER'S DIRECT DIAL NUMBER
212-307-
42909

July 31, 1987

Honorable Joseph A. Biden, Jr.
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing to recommend strongly the confirmation of Susan Liebeler to the U.S. Court of Appeals for the Federal Circuit. I have practiced international trade law for a number of years and I have been very impressed with Chairman Liebeler since she joined the International Trade Commission.

I have practiced before the ITC for some ten years representing a variety of domestic and foreign clients in escape clause proceedings as well as dumping and countervaling duty cases. I have argued many such cases before Chairman Liebeler.

In her opinions under Section 337 of the Tariff Act of 1930, Chairman Liebeler has developed a cogent and reasonable framework for protecting intellectual property rights. She has also demonstrated a great deal of respect for the findings of the Administrative Law Judges who hear the cases first and she has faithfully and honestly followed the precedent of the Federal Circuit.

Chairman Liebeler will make an excellent federal circuit court judge and I recommend that she be confirmed without delay.

Sincerely yours,

Pierre F. de Ravel d'Esclapon

PFdeRd'E:ml

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CABLE ADDRESS
DEBLAW

July 13, 1987

The Honorable Joseph A. Biden, Jr.
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Chairman Biden:

I am writing this letter to recommend that you confirm the appointment of Susan Liebeler to the United States Court of Appeals for the Federal Circuit.

I have known Mrs. Liebeler for approximately 15 years. She is an outstanding member of the Los Angeles legal community. I have personal knowledge of her abilities as she was a consultant to my own law firm some years ago.

As the past president of the Los Angeles Trial Lawyers Association and presently as the president of the Los Angeles County Bar Association, I have had an opportunity to work with, oppose and observe many lawyers. Susan Liebeler is among the first rank of this group. She is well qualified to serve on the Federal Circuit Court of Appeals.

If I can be of any further assistance, please do not hesitate to call upon me.

Sincerely,

Larry R. Feldman

Larry R. Feldman
of
FOGEL, FELDMAN, OSTROV,
RINGLER & KLEVENS
A Law Corporation

LRF:ina

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Hawthorne CA 90250-6692
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November 3, 1987

The Honorable Joseph Biden
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

It is my understanding that Ms. Susan Liebeler is currently under consideration by the Senate Committee on the Judiciary for appointment to the United States Court of Appeals for the Federal Circuit.

I have known Ms. Liebeler since 1964 during which time I was a fellow student in law school and worked with her thereafter for approximately two years as a colleague in the Law Department of a New York Stock Exchange listed corporation.

While Ms. Liebeler's academic record will attest to the fact that she was an exemplary law student, her performance as a fellow practicing attorney is more significant to me as a basis for my recommendation to you.

Ms. Liebeler's almost compulsive insistence on reviewing and understanding all of the facts relevant to a given problem or situation prior to reaching a conclusion or expressing an opinion were relied on by her clients and associates.

Her obvious intellectual capacity and demanding interpretation of applicable law or regulations never interfered with her ability to communicate or counsel with the operating management of the company. In short, management and staff alike sought her out for advice and as a "sounding board." Perhaps best put, she is a broad range, balanced analytical person who just happens to have chosen to train and practice as an attorney.

The same willingness, more accurately requirement, to hear and comprehend the issues at hand coupled with the objective intellectual honesty and even temperament which allowed her to excel as an attorney to business clients would serve her well on the bench, particularly in dealing with complex sensitive issues.

Thank you for taking the time to consider my views. If you should have any need for clarification of anything contained herein or any question on issues not addressed, please feel free to contact me at any time. Needless to say, were I in a position to do so, I would appoint Ms. Liebeler to the bench knowing full well that she would be a credit to the Court, the Committee and above all the system in general.

Sincerely yours,

RWF:DD

November 5, 1987

The Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
SR-489 Russell Senate Office Building
Delaware & Constitution Ave., N.E.
Washington, D.C. 20510-0802

Dear Senator Biden:

I am writing in support of the nomination of Susan Liebeler for the United States Court of Appeals for the Federal Circuit. In connection with the Committee's evaluation of Ms. Liebeler's qualifications and background, I ask that this letter be brought to the attention of the full Committee and that it be made a part of the record of the hearing on Ms. Liebeler's nomination.

I am a 1982 graduate of Loyola Law School, where Ms. Liebeler taught for several years. I am currently a practicing lawyer here in Washington at the firm of Debevoise & Plimpton. The purpose of this letter is to let this Committee know that, without the slightest reservation, I endorse her nomination.

I first knew Ms. Liebeler in 1980 as a student in her class on the law of Corporations. Although, at the time, I had approached the class with some trepidation, to my surprise and delight, Ms. Liebeler's superb teaching ability turned it into the most fascinating and intellectually stimulating course that I had in law school.

Ms. Liebeler's approach to the law is, in my opinion, thoroughly rooted in incisive analysis and an ability to reason closely from precedent. She was not hidebound to any one particular reading of the law or course of action. Rather, one of Professor Liebeler's strengths in the classroom was that she examined and urged her students to consider thoroughly the gamut of different interpretations that might be available under the law. Nevertheless, she also was exceptionally and, in my view, appropriately reluctant to stray beyond a fair reading of the four corners of the statute or regulation that we were examining.

As remarkable as Ms. Liebeler's analytical ability was her capacity to stimulate discussion and invigorate debate among her students. Ms. Liebeler earned and deserved the respect and affection of many of us because she always treated us fairly and demonstrated a genuine interest in us.

Outside the classroom, Ms. Liebeler was devoted to Loyola Law School and to her students. She initiated and developed Loyola's judicial clerkship program; as a result, students such as myself had the opportunity to clerk for federal judges after graduating from law school. Instituting and supervising this program required a significant investment of Ms. Liebeler's time, energy and patience -- all of which she gave unstintingly.

Ms. Liebeler and I have remained friendly since I graduated from Loyola. Over the years and on a consistent basis, she has been available to counsel me on career decisions. She has assisted me in weighing options and, after careful reflection, done her utmost to point me in the right direction.

Although I have, in the past, felt strongly about appointees to the federal judiciary, I have never come forward to express my views. I now, however, feel compelled to do so. Based on my long-time and extensive contact with Ms. Liebeler, I believe her to be an outstanding legal scholar of suitable judicial temperament and inclination that will enable her to approach each case she is assigned fairly and with an open mind. In short, I can think of no candidate for the judiciary whom I would support more wholeheartedly.

Thank you for considering these views.

Very truly yours,

D. Annette Fields

D. Annette Fields

Federal Bar Association

Office of the President
Stanley M. Fisher
Respond to:
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1100 Huntington Building
Cleveland, Ohio 44115
216/696-1100

JUDICIARY COMMITTEE
'87 APR 20 PM 5:21

April 15, 1987

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senator Biden:

I am writing to you in my capacity as President of the Federal Bar Association to support President Reagan's recent nomination of Susan Liebler to the Court of Appeals for the Federal Circuit.

As you are aware, Ms. Liebler has had an outstanding legal career having held numerous positions in the federal government which she has served with great distinction. Ms. Liebler began her federal career as a law clerk in 1966 for the U.S. Court of Appeals. Subsequently, she served as a Consultant to the U.S. Price Commission and Y.S. Railways Association. In 1981-1982, Ms. Liebler became Special Counsel to Chairman Shad at the Securities and Exchange Commission and in 1984 was appointed to the International Trade Commission. Since June 1986, Ms. Liebler has been Chairman of that agency.

In each of these positions, Ms. Liebler has been a role model to many who have chosen a career in the federal service. Moreover, during these past twenty years, she has consistently demonstrated her substantive diversity, commitment to excellence and ability to adhere to the strength of her convictions.

These qualities more than qualify her to serve on the Court of Appeals for the Federal Circuit.

Sincerely yours,

Stanley M. Fisher
President

SMF/st

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AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
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CHAIRMAN
Member-at-Large
Robert B. Fiske, Jr.
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SECOND CIRCUIT
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30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
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Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
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Columbus, OH 43215

SEVENTH CIRCUIT
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Chicago, IL 60611

EIGHTH CIRCUIT
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Lincoln, NE 68501

NINTH CIRCUIT
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Samuel L. Williams
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TENTH CIRCUIT
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Denver, CO 80203

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March 25, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: SUSAN W. LIEBELER
United States Court of Appeals
for the Federal Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Susan W. Liebeler for appointment as Judge of the United States Court of Appeals for the Federal Circuit.

Our Committee is unanimously of the opinion that Ms. Liebeler is "Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

August 7, 1986

The Honorable Susan Liebeler
Chairman
U.S. International Trade Commission
701 E Street, N.W.
Washington, DC 20436

Dear Chairman Liebeler:

As individuals concerned with trade policy, we would like to comment upon the controversy that has arisen over the appropriate role that economic analysis should play in your deliberations. That controversy, we believe, reflects a misunderstanding of the nature of the trade laws and the intent of Congress in enacting these laws. Trade, by its nature, is an economic phenomenon. The judgments that form the basis of specific trade cases — for example, injury and causation under both the escape clause and the antidumping and countervailing duty statutes are therefore economic judgments.

Obviously, that analysis should rely upon the best available data and the most reliable tools of the economic profession. Industries depend upon a consistent and reliable interpretation of our trade laws for their very livelihood. If the ITC were to reject an economic framework, what would replace it?

We think it particularly commendable that you have elected to improve your analytic procedures when your workload is rapidly increasing and you are more frequently in the public eye. Lacking the structure and consistency provided by rigorous economic analysis, the ITC might soon find itself making judgments based on political pressures and impassioned rhetoric rather than congressional intent. That would be unfortunate. The ITC is charged with impartially implementing the existing trade laws — not amending them. Reliance on economic analysis implies no rewriting of trade legislation.

We believe that Congress recognized the economic nature of trade issues and expected that the ITC would make the greatest possible use of economic analysis. There is, of course, some ambiguity in the language used by Congress to express its mandate. Legislation represents compromises and that gives rise to conflicting interpretations of what Congress might have intended. Nonetheless, it is clear that Congress intended that the ITC consider the economic facts involved in cases.

This intent is illustrated in, among others, the following statutory and legislative excerpts:

> "IN EXAMINING THE IMPACT ON THE AFFECTED INDUSTRY, THE COMMISSION SHALL EVALUATE ALL RELEVANT ECONOMIC FACTORS WHICH HAVE A BEARING ON THE STATE OF THE INDUSTRY..." 19 U.S.C. § 1677(7)(c)(iii)
>
> The antidumping and countervailing duty laws both charge the Commission with determining whether "AN INDUSTRY IN THE UNITED STATES IS MATERIALLY INJURED, OR IS THREATENED WITH MATERIAL INJURY,...BY REASON OF IMPORTS..." 19 U.S.C.§ 1671(a)(2), 19 U.S.C. §1673(2).
>
> The escape clause requires the Commission "TO DETERMINE WHETHER AN ARTICLE IS BEING IMPORTED INTO THE UNITED STATES IN SUCH INCREASED QUANTITIES AS TO BE A SUBSTANTIAL CAUSE OF SERIOUS INJURY, OR THREAT THEREOF, TO THE DOMESTIC INDUSTRY PRODUCING AN ARTICLE LIKE OR DIRECTLY COMPETITIVE WITH THE IMPORTED ARTICLE." 19 U.S.C. §2251(b)(1)
>
> "IN DETERMINING WHETHER MATERIAL INJURY EXISTS, THE ITC WILL CONSIDER THE FACTORS SET FORTH IN SECTION 771(7)(3), (c) and (d), TOGETHER WITH ANY OTHER INFORMATION IT DEEMS RELEVANT." H. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979).
>
> "IN MAKING ITS DETERMINATION (regarding alleged injury to a domestic industry) THE COMMISSION SHALL TAKE INTO ACCOUNT ALL ECONOMIC FACTORS WHICH IT CONSIDERS RELEVANT.." 19 U.S.C.§ 2251(b)(2).

Failure to rely on the best tools available would be inconsistent with the requirements of the trade laws and the spirit of Congress and would merely increase the likelihood that your decisions would reflect more the political strengths of those petitioning for relief than the merits of their claims. The trade laws may well provide valuable transitional relief for industries enabling them to resume a healthy role in the world economy. It would be unwise to allow these laws to become merely costly crutches for groups that can generate political pressures but cannot establish the legal merits of their claims.

We are also concerned by the attempts of some members of Congress to pressure several commissioners to change their approaches. Congress writes the trade laws, but the Commission administers them. If someone believes that a Commissioner's determination is not in accord with the law, they should request the courts to decide.

Once again, we applaud your efforts in attempting to administer with impartiality and care the law as mandated by your statutory responsibilities.

Sincerely,

NAME	ORGANIZATION (for identification purposes only)
Ms. Doreen Brown	Consumers for World Trade
Dr. Robert Crandall	Brookings Institution
Mr. Richard Fink	Citizens for a Sound Economy
Dr. Gottfried Haberler	American Enterprise Institute
Dr. Steve Hanke	Friedberg Commodity Management, Inc.
Dr. Edward Hudgins	Heritage Foundation
Dr. Marvin Kosters	American Enterprise Institute
Mr. Robert Litan	Brookings Institution
Ms. Mary Melrose	Citizens for a Sound Economy
Mr. James Moody	The Capital Legal Foundation
Mr. Anthony Murry	The Capital Legal Foundation
Dr. Peter Nelson	International Trade Council
Dr. William Niskanen	Cato Institute
Mr. Robert Poole	The Reason Foundation
Mr. Fred Smith	Competitive Enterprise Institute
Mr. Eduardo Somensatto	American Enterprise Institute
Dr. Herbert Stein	American Enterprise Institute
Ms. Deanna Tanner	Competitive Enterprise Institute
Dr. Philip Trezise	Brookings Institution

cc: Members of the House Subcommittee on Trade
Members of the Senate Finance Committee

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[illegible] SPEARS
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[illegible] FREEDMAN
[illegible] LEWIS
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RETIRED

WRITER'S DIRECT DIAL

REF. OUR FILE NO.

November 4, 1987

VIA FEDERAL EXPRESS

Honorable Joseph Biden, Chairman
Senate Committee on the Judiciary
224 Dirksen
Senate Office Building
Washington, D.C. 20510

Re: Nomination of Susan Liebeler for the United States Court of Appeals for the Federal Circuit

Dear Chairman Biden:

I am writing in order to state my support for Susan Liebeler's appointment as a judge for the United States Court of Appeals for the Federal Circuit, and to add my positive opinions about Susan Liebeler's valued contributions to Loyola Law School, Los Angeles, during the time I was a student there.

A short statement about my education and experience may assist you. After receiving my Juris Doctor from Loyola Law School in 1977, I received my Masters in Law (LL.M.) from Boalt Hall (University of California, Berkeley, School of Law) in 1978. I am now a partner in the litigation department in the law firm Ervin, Cohen & Jessup. My firm represents a variety of clients ranging from large institutions to small and medium size businesses and individuals on general business, real estate, contract, securities and related matters.

During my experience at Loyola, Ms. Liebeler had the highest reputation for her intellectual abilities, her mastery of the subject matters she taught, and her ability to impart a full understanding of the often complex issues and subjects in which she instructed her students. While a high grade was surely earned in her class, students often stated that "if you really want to learn about securities laws and regulations, take Susan Liebeler's course."

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Honorable Joseph Biden, Chairman
November 4, 1987
Page Two

I know that Susan Liebeler deeply cared about her students and the quality of their education, and was sensitive to the needs and interests of the students as a group, and individually. I had occasion to deal with Ms. Liebeler in the context of her service on a committee which was designed to serve an intermediary function between students and the faculty/administration. Based on my discussions with Ms. Liebeler on issues about which there were often intense controversy, I learned that she had a tremendous ability to focus all participants on the real issues, and to encourage a logical and fair resolution.

In my opinion, Susan Liebeler was a tremendous asset to the law school and to the legal community as well. She will certainly be a fine and fair justice.

Respectfully submitted,

Dean B. Herman

DBH/lo

THE FEDERAL CIRCUIT BAR ASSOCIATION

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THE HONORABLE
FRANCIS X GINDHART
UNITED STATES COURT OF
APPEALS FOR THE
FEDERAL CIRCUIT
717 MADISON PLACE, N W
WASHINGTON, D C 20439
(202) 633-6550

July 27, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Biden:

The Federal Circuit Bar Association is a national bar association consisting of 1,400 members. One of our primary responsibilities is to assure that highly qualified persons are appointed to the Court of Appeals for the Federal Circuit.

By letter to you dated April 1, 1987, the President of the Association informed you that that we had carefully examined the qualifications of Chairman Susan Liebeler and found her to be well qualified for appointment to the Court of Appeals for the Federal Circuit. We also found that she possesses the high ability, integrity, and judicial capacity required for this important Court.

We would appreciate an opportunity to testify at the hearing on her nomination.

The Court is now short two judges, and we request early consideration of this nomination. If we can be of any assistance to the Committee, please let me know.

Sincerely,

Clarence T. Kipps, Jr.

Clarence T. Kipps, Jr.
Chairman
Judicial Selection Committee

cc: All members of the
Senate Judiciary Committee
The Honbrable Edwin Meese, III
The Honorable Stephen J. Markman
The Honorable A. B. Culvahouse
Jack C. Goldstein, Esq.
bcc: Ms. Susan Liebeler

SYRACUSE UNIVERSITY
COLLEGE OF LAW

Office of the Dean

Syracuse, New York 13244-1030
(315) 423-2540

20 October, 1987

Hon. Joseph Biden, Chairman
Senate Committee on the Judiciary
224 Senator Dirksen Office Building
Washington, D.C. 20510

Dear Senator Biden:

It has just come to my attention that Susan Liebeler, who is presently a member of the International Trade Commission, is being considered for an appointment to the Federal Circuit Bench and that her name has been advanced by the present Administration. I write in her behalf. I have known Ms. Liebeler since 1978 when I served with her on the faculty of the Loyola Law School in Los Angeles. She is a fine judicial candidate with the temperament, bearing and experience that will bring to the bench one of our finest lawyers. I am a liberal Democrat and am on the opposite side of the political fence from Susan but I am tremendously impressed with her compassion for the principles underlying the Constitution that support the rights of the people. She is one of the brightest lawyers I have met; one of the strongest; one of the most sensitive. We could not do better with an Administration recommendation than to have Susan on the bench; we would be hard pressed to do better with a Democrat.

Respectfully yours,

Travis H. D. Lewin

Travis H. D. Lewin
Interim Dean

Katherine A. Lind
6873 Wilding Place
Riverside, CA 92506

November 4, 1987

Hon. Joseph Biden
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am a Deputy County Counsel for the County of Riverside, State of California, and am writing to request that you confirm the nomination of Susan W. Liebeler to the United States Court of Appeals for the Federal Circuit.

I first met Ms. Liebeler in 1980 at Loyola Law School, Los Angeles where she was a professor in charge of the Judicial Extern Program and I was a first year law student interested in obtaining a judicial externship. We subsequently discussed the subject of externships on several different occasions, and on each occasion, she patiently listened to my interests and goals and offered suggestions on how best to achieve them. Ultimately, she assisted me in securing an externship with a judge for the United States Court of Appeals for the Ninth Circuit. During that same time period, she also encouraged and convinced me to compete in the law review selection process, explaining the value that the law review experience would have for me, both personally and professionally.

In the fall of 1982 and spring of 1983, my last year as a law school student, I served as Ms. Liebeler's research assistant and in that capacity, assisted her in resolving legal questions on issues with which she was specifically concerned. Consistently, she carefully considered both the conclusions that I had drawn from my legal research and the underlying cases and statutes before deciding to adopt a particular position.

In short, based on my personal experiences, I believe that Ms. Liebeler is well-suited to serve as a member of the judiciary. She is not only academically and intellectually qualified, but she is, in addition, willing to listen, open-minded, and considerate of the views of others even if they are contrary to her own.

Very Truly Yours,

Katherine A. Lind
KATHERINE A. LIND

ITC TRIAL LAWYERS ASSOCIATION
2000 K STREET, N.W.
WASHINGTON, D.C. 20006
[illegible]

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erm expires - 1988)

Tuesday, August 4, 1987

Steve Metalitz, Esq.
Special Counsel
United States Senate
Committee on the Judiciary
Dirksen Building, Room 224
Washington, D.C.

BY HAND

Re: Federal Circuit Nominee Susan Liebeler

Dear Mr. Metalitz:

On behalf of the International Trade Commission Trial Lawyers Association, I am pleased to enclose for your consideration and that of the Committee on the Judiciary a copy of a letter addressed to Attorney General Meese and authorized by the Executive Committee of the Association endorsing the nomination of Susan Liebeler to the Court of Appeals for the Federal Circuit.

The Association respectfully requests that the present letter and its attachments be made of record by the Committee in its hearing to be held on August 6, 1987.

Respectfully yours,

Steven E. Lipman
Chairman
Judicial Selection Committee

Enclosure
cc. Ms. Diana Huffman

ITC TRIAL LAWYERS ASSOCIATION

2000 K STREET, N.W., SUITE 300
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Friday, April 24, 1987

The Honorable Edwin Meese
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Re: Federal Circuit Nominee Susan Liebeler

Dear Mr. Attorney General:

As Chairman of the Judicial Selection Committee of the International Trade Commission Trial Lawyers Association, I am writing on behalf of the Association with respect to the nomination to the Court of Appeals for the Federal Circuit of International Trade Commission Chairman Susan Liebeler.

As can be seen from the attached, the Association's members are attorneys who practice or are otherwise interested in Section 337 cases before the U.S. International Trade Commission. It is the Association's position that candidates to the Federal Circuit should bring to the Court expertise in intellectual property and trade law, and should be evaluated further on general judicial qualifications. In this regard, the ITC Trial Lawyers Association is pleased to lend its endorsement to the candidacy of ITC Chairman Susan Liebeler because of her expertise in trade law, and would be pleased to testify on her behalf before the Senate Judiciary Committee.

Respectfully submitted,

Steve E. Lipman

Steven E. Lipman
Chairman
Judicial Selection Committee

Enclosure

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HARVEY FIERSTEIN
(1923-1984)

November 4, 1987

VIA HAND DELIVERY

Honorable Joseph Biden
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Susan W. Liebeler: Nominee to the United States Court of Appeals, Federal Circuit

Dear Mr. Biden:

I am writing to you in support of Susan W. Liebeler and her nomination to the United States Court of Appeals for the Federal Circuit.

While attending Loyola Law School here in Los Angeles in 1978, I had Susan Liebeler as my teacher for a course in Corporations Law. I found Susan to be a bright, extremely capable educator who was thorough and challenging in her presentation of the subject matter, yet concerned about the level of comprehension of that subject matter by her students. Susan interacted well with her students, often eliciting discussions on issues important to an understanding of the law. She was receptive to questions from all students and very willing to listen to and to discuss positions which differed from her own.

Based on my experiences and observations in Susan's class, I feel that she is well suited to the position on the federal bench for which she has been nominated. I urge you to recommend that Susan Liebeler's nomination be confirmed.

Very truly yours,

Linda S. Masada

Linda S. Masada

LSM/clm

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

October 28, 1987

The Honorable Joseph Biden, Jr.
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Biden:

I write concerning the nomination of Susan Liebeler to the United States Court of Appeals for the Federal Circuit. As a former practitioner in the area of international trade, I have followed Ms. Liebeler's work at the International Trade Commission with considerable interest and admiration. The levels of analytic rigor and interpretive skill that she has exhibited throughout her career at the ITC are invaluable assets, ones that will make Ms. Liebeler an outstanding federal appellate judge.

As you know, the ITC deals with extremely difficult and sensitive trade questions. These issues are both legal and economic, as are those that a judge on the Federal Circuit must address. As the only lawyer at the ITC, Ms. Liebeler has shown an ability reasonably to interpret the law in countervailing duty and dumping cases, and her opinions have greatly improved the logic and consistency of trade law issuing from the ITC. Her interest and great ability in financial analysis are likewise evident in her opinions.

Overall, Susan Liebeler's high personal and intellectual standards as commissioner indicate that she will make a superb federal judge. I urge you to support vigorously her nomination.

Sincerely,

Fred S. McChesney

Fred S. McChesney
Visiting Professor

National Association of Women Judges

NAWJ

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Los Angeles Superior Court

July 15, 1987

Hon. Joseph A. Biden, Jr.
Chair, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I write to urge your confirmation of Susan Liebeler to the United States Court of Appeals for the Federal Circuit. As you are aware, there have been few appointments of women to the federal bench, a subject of major concern to our organization. It is of great importance that qualified women be given an opportunity to serve in this capacity.

Susan Liebeler has a reputation in California for hard work, integrity, scholarship, and forthrightness. She has taught corporate securities and published extensively. Her work, both in California and nationally, shows she has earned this appointment.

Very truly yours,

JUDITH McCONNELL
President-Elect
National Association of Women Judges

JMc/lk
cc: Susan Liebeler

jmc/liebeler

LOYOLA LAW SCHOOL

October 29, 1987

Honorable Joseph A. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

Twenty years ago, after graduating from the University of Denver College of Law and passing the Colorado Bar exam, I began my first job as a lawyer, working as a staff law clerk with the U.S. Court of Appeals for the Tenth Circuit. I spent three years working closely with Chief Judge Alfred P. Murrah and the other members of the court before leaving, at Judge Murrah's request, to become the attorney for the Judicial Panel on Multidistrict Litigation in Washington, D.C. (I later served as Judge Murrah's executive assistant when he became the second Director of the Federal Judicial Center.) Although its been many years, I have not forgotten the time I spent with the federal courts. Undoubtedly my greatest reward was the opportunity to work closely with many of the giants of the federal bench; men like Judge Murrah and Judges Breitenstein, Doyle, Lewis, Seth and Hill from the Tenth Circuit; Judges Weinfeld, Wisdom, Becker, Robson, Lord and Weigel on the Multidistrict Panel; and transferee judges like Judges Wyatt, Pregerson, Swinford, Caffrey and many others.

I mention these great federal judges whom I have been privileged to know and to work with, not to impress you but to impress upon you the depth of my respect for the federal court system and my admiration for so many of its fine judges. Your responsibility as a member of the Senate Judiciary Committee is a truly awesome one as the events of the past few weeks clearly demonstrate. Participating in the process by which men and women are elevated to the federal bench is, in my judgment, one of the most important duties a senator performs. I would not seek to advise you as to how you should discharge that responsibility unless I could make an unconditional and unreserved recommendation, something I quite frankly could not do with respect to some recent nominees. But the nomination of Susan Liebeler to be a judge on the U.S. Court of Appeals for the Federal Circuit is one upon which I can comment with confidence and conviction.

I have known Susan Liebeler for many years. We were colleagues here at Loyola for ten years and were and have remained good friends notwithstanding the fact that we have disagreed, often strongly, on many important issues. What made her such a good colleague was her willingness to listen--really listen, not just pretend to do so--to opposing points of view. I suspect that my arguments changed her mind a time or two; I know she has changed mine once or twice.

As a colleague she evidenced the traits which, in view of my familiarity with the federal courts, convince me that she would make a great federal judge: intelligence, integrity, dedication and commitment. She sets high standards. . .both for herself and

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others. While she may become annoyed with those who appear before her unprepared or poorly prepared, all of the judges I mentioned above would, when necessary, show their displeasure with poor lawyering. As you know, a major concern has been the maintenance of the quality and integrity of the federal courts as the number of federal judges and the number of lawyers who practice before them continue to grow. Undoubtedly the best way to do so is to appoint judges who set and maintain high standards of professionalism for themselves, their staff and those who appear before them.

I have absolutely no doubt that Susan Liebeler would uphold those high standards; I would not recommend that she join that select group of federal judges who I admire so greatly if I thought otherwise. I hope you will join with the other members of the Committee in unanimously recommending her confirmation.

Sincerely yours,

John T. McDermott
Professor of Law

JTM/emt

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OUR FILE NO.

November 3, 1987

The Honorable Joseph Biden
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Susan Liebeler

Dear Senator Biden:

It is my understanding that Ms. Susan Liebeler is being considered by the Senate Committee On the Judiciary for appointment to the United States Court of Appeals for the Federal Circuit. This is to highly recommend that Ms. Liebeler receive the appointment.

I have known Ms. Liebeler since 1970 when we were fellow employees on the legal staff of a large New York Stock Exchange listed corporation. During the period of our association, she exhibited the ability to combine her intellect, a thorough investigation of the facts and research of the law to completely analyze issues before her. The analysis led to sound advice to her employers, the officers and directors of the corporation, and to her colleagues. Even at that early stage of her legal career, her maturity, judgment and analytical abilities were widely recognized and admired.

To reiterate, I highly recommend that Ms. Liebeler be appointed to the United States Court of Appeals for the Federal Circuit.

Thank you for the opportunity to present my views to you. If you need any clarification or have further questions, please contact me.

Very truly yours,

PETER R. PANCIONE

PRP:ns

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SANTA BARBARA · SANTA CRUZ

OFFICE OF THE DEAN
SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

July 13, 1987

Honorable Joseph R. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing with regard to Susan Wittenberg Liebeler, who has been nominated to serve on the Court of Appeals for the Federal Circuit, with the hope that my comments might be of some use in your evaluation of her in the confirmation process.

Susan Wittenberg Liebeler was one of the most outstanding graduates of the UCLA School of Law's class of 1966. She spent her initial year of law school at the University of Michigan and then transferred to UCLA where she graduated 4th in her class of 214 students. She joined the UCLA Law Review as a transfer, published a comment and became a Senior Editor. Because I was not a member of the UCLA faculty at the time Susan Liebeler was a student here, I have asked both of my immediate predecessors as Dean, William Warren and Murray Schwartz, for their impressions. Each of them remembers her clearly and positively. She was then, as she has demonstrated herself to be during her career after law school, highly intelligent and dedicated.

She appears to have the ability to delve into masses of technical detail, emerging with technical mastery without losing sight of the important public policy implications of particular decisions. This quality has enabled her to deal with the complex subject matter of the U.S. International Trade Commission and strikes me as a particularly important ability for service on the Court of Appeals for the Federal Circuit, given its specialized and often technical subject matter jurisdiction.

It occurs to me that perhaps the most useful comment I might be able to make is that from my own contacts with Susan Liebeler I have the impression that she is a completely candid and direct person. My experience suggests that if she has views she will be forthcoming in response to your questions in the confirmation process, even if she knows that her responses are in a vein quite contrary to that you might most want to hear. She certainly is a person who would not be reluctant to reach unpopular conclusions.

I hope that these comments will be of some small help, and that you will feel free to have one of the staff call if you have any questions.

Sincerely,

Susan

Susan Westerberg Prager
Dean

SWP:so

Chron.

BENJAMIN N. CARDOZO SCHOOL OF LAW
YESHIVA UNIVERSITY
55 FIFTH AVENUE, NEW YORK, N.Y. 10003

FICE OF THE DEAN PHONE (212) 790-0310

October 12, 1987

The Honorable Joseph A. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen
Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing to ask you to support Ms. Susan Liebeler, whom the President has nominated to the United States Court of Appeals for the Federal Circuit. She had hearings before the Judiciary Committee on August 6, 1987 during which, I understand, she gave an excellent account of herself. I know her as a distinguished graduate of UCLA Law School as well as the wife of one of my colleagues on the faculty of that law school, where I taught for many years before becoming Dean of Cardozo.

Ms. Liebeler will make an excellent circuit judge. She has enormous personal integrity. She is very bright. She has distinguished herself as a private practitioner, a professor of law, and most recently as Commissioner and Chairman of the International Trade Commission. She is particularly well suited for appointment to the Federal Circuit because of her extensive background in trade law and in the laws of patent and intellectual property, areas which are a significant part of the case load of the Federal Circuit.

I am especially pleased to be able to support the nomination of such a highly qualified woman to the Court of Appeals. She is both bright and assertive -- I have no doubt that she has the qualities of judgment and temperament that will make her a successful member of the Court of Appeals.

I urge the Judiciary Committe to give her nomination favorable consideration.

Sincerely,

Monroe E. Price
Dean

MEP:bdo

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LOREN R. ROTHSCHILD
President

October 12, 1987

The Honorable Joseph Biden
United States Senator
The Hart Senate Office Building
Washington, D.C. 20510

Dear Senator:

I am writing this letter to recommend the confirmation of Susan Liebeler to the United States Court of Appeals for the Federal Circuit. Ms. Liebeler is exceptionally well qualified for the position.

I was a practicing lawyer in a Los Angeles law firm for approximately 25 years. The majority of my firm's practice consisted of representation of business clients, labor law and civil litigation. During the time I practiced law, I was president of the Los Angeles Association of Business Trial Lawyers, chairman of the Los Angeles County Bar's Committee on Court Reform and of the ad hoc Committee on Court Financing and a member of the Los Angeles County Judicial Procedures Commission. I am now the president of American Protection Industries, Inc., a diversified company whose subsidiaries include The Franklin Mint, Teleflora and agricultural properties in the San Joaquin Valley.

I have known Ms. Liebeler for over 20 years, both professionally and as a friend. My own acquaintance with her and her reputation convince me that she is hard working, intelligent and forthright. I have a high regard for her abilities and integrity. In my dealings with her, she has always exhibited a demeanor suitable to a judge. She is patient, calm and courteous. She is highly regarded by the students who attended her courses at Loyola University School of Law.

I recommend her appointment without reservation.

If I can be of further assistance, please contact me.

Very truly yours,

Loren R. Rothschild

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WASHINGTON, D.C. 20006-4793
[illegible]

TOM M. SCHAUMBERG
[illegible]

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TELECOPIER (202) 383-6610

August 4, 1987

Senator Strom Thurmond
Senate Judiciary Committee
Senate Office Building
Room SD-139
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to strongly recommend confirmation of Susan Liebeler to the United States Court of Appeals for the Federal Circuit. During her tenure on the U.S. International Trade Commission, both as a Commissioner and, now, as Chairman, she has served ably and with determination.

As a practitioner in the field of unfair foreign competition, particularly cases under Section 337, I have been a student of the Commission for many years. I have found Chairman Liebeler to be open-minded, thoughtful and extremely intelligent. As the first president of the ITC Trial Lawyers Association, I had occasion to invite Chairman Liebeler to several conferences at which she was either the principal speaker or a panelist. She was always well-prepared, responsive to her audience and warmly received.

I have the highest respect for Chairman Liebeler's integrity and ability. She will make an excellent addition to the bench. I recommend Chairman Liebeler without reservation.

Sincerely yours,

Tom Schaumberg

Tom M. Schaumberg

RICHARD T. SCHULZE
5th District, Pennsylvania

WAYS AND MEANS
COMMITTEE

Congress of the United States
House of Representatives • Washington, DC 20515

August 3, 1987

Honorable Joseph R. Biden, Jr., Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. ~~Chairman:~~ Joe

It is my understanding that Susan Liebeler, Chairman and Commissioner of the U.S. International Trade Commission, has been nominated to the United States Court of Appeals for the Federal Circuit. As a Member of the Subcommittee on Trade of the Committee on Ways and Means, which has oversight responsibility for the ITC, I have sat in on many Subcommittee hearings at which Commissioner Liebeler has testified. I fully support this nomination and hope you will give it your favorable attention when the Senate Judiciary Committee convenes on this matter.

As you know, the Court of Appeals for the Federal Circuit presides over matters ofjurisdiction relative to, among others, the United States Court of International Trade and the United States International Trade Commission. Commissioner Liebeler has demonstrated knowledge and expertise in the complicated world of our trade laws and has administered the Commission in an even-handed and fair manner. In addition to her wealth of knowledge in the trade area, Commissioner Liebeler has taught the law at major universities, served in private practice and administered the law through her service on the Securities and Exchange Commission and on the ITC.

Commissioner Liebeler would be an asset to the Court of Appeals for the Federal Circuit and would, I feel certain, serve with distinction. I submit her resume to you for your thoughtful consideration.

With best wishes, I am

Sincerely,
Dick
DICK SCHULZE
Member of Congress

PLEASE RESPOND TO:

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EMBASSY OF THE
UNITED STATES OF AMERICA
THE HAGUE

AMBASSADOR JOHN SHAD

September 4, 1987

The Honorable Joseph R. Biden
Chairman, Senate Judiciary Committee
Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I would like to highly commend to your favorable consideration the nomination of Ms. Susan Liebeler to the U.S. Court of Appeals for the Federal Circuit.

Ms. Liebeler served on the senior staff of the Securities and Exchange Commission in 1981 when I was Chairman. She has a keen legal mind, great integrity and ability. I believe she would serve with distinction.

I shall be glad to provide any additional information you may request.

Sincerely,

John Shad

John Shad

bcc: ✓Ms. Ethel Z. Geisinger
Kutak Rock & Campbell

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July 31, 1987

FILE NO.

Honorable Joseph Biden, Jr.
Chairman, U. S. Senate Committee
on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Senator Biden:

I understand that next week your Committee is considering the President's nomination of my old and good friend and colleague, Susan Liebeler, for a seat on the U. S. Court of Appeals for the Federal Circuit.

Doubtless you will be hearing from a variety of people as to Susan's background and talents. But it occurred to me that, as a former "boss" of Susan's, I might be able to provide you with some insights that could be both helpful and somewhat different from those that you will receive from other sources.

Susan and I first became acquainted in early 1970 when I was Vice President and General Counsel for a large publicly-held conglomerate called Republic Corporation. During the two years that she worked with me as an Associate General Counsel in Republic's Law Department, I found that she was not only a superb lawyer but also a delightful colleague -- quick-witted, utterly candid, possessed of a splendidly wry sense of humour and incredibly reliable (if she promised to do something, it was invariably done on time and without the need for any "double-checking" by others in our Department).

I also quickly came to value her insights into a wide variety of complex subjects. As a life-long "liberal Democrat", I found myself entirely comfortable exchanging disparate views with her on all sorts of subjects -- ranging from law to economics to politics to feminism to...you name it. Our conversations were invariably stimulating dialogues, never monologues nor diatribes. And even though we may have begun at very different starting points, since her orientation was generally somewhat more "conservative" than mine, it was surprising how often we found ourselves agreeing on numerous bedrock issues.

The point I'm trying, perhaps somewhat clumsily, to make is that Susan is not a "knee-jerk" anything. On the contrary, she is invariably both scholarly and scrupulously evenhanded in her approach to difficult questions. In short, she is the kind of person with whose decisions I would feel comfortable, not because I always agreed with them but because I always knew that they were the judicious product of both a fine mind and a decent human being.

During the 17 years that have elapsed since Susan and I first became acquainted, we have remained in regular contact with one another and it's been a source of great pleasure to me to watch her continued professional and personal growth. While we were together at Republic, her superb legal work and delightful personality helped make me and the rest of my Department "look good". I am certain that, if her nomination is confirmed by your Committee, she will also make your confirmation of her "look good" by achieving speedy recognition as an outstanding jurist.

Thank you so much for taking the time to read this letter and to consider Susan's nomination.

Very truly yours,

Alan Stamm

ALAN STAMM

AS:hm

cc: Honorable Strom Thurmond

bcc:Susan Liebeler

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

August 11, 1987

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Biden:

I am writing to express my support for the nomination of Susan Liebeler to the United States Court of Appeals for the Federal Circuit.

I have worked in the area of international trade law for a number of years, first as a practitioner and presently as a law professor, and have appeared before Chairman Liebeler at the International Trade Commission on several occasions. I have always found her to be a fair and thoughtful decisionmaker. She is attentive and open-minded, and her probing questions reveal her to have an incisive legal mind. She has no tolerance for sloppy analysis, and holds those who appear before her to the highest standards of preparedness and legal reasoning.

Her most important contributions lie in her opinions. She is meticulous about them, and clearly articulates the basis for her decisions. Her opinions have greatly clarified the analysis of the Commission in several areas of the law. Her consistency from case to case, and her analytical rigor, have considerably raised the quality of legal analysis at the Commission.

In conclusion, I urge you to vote to approve the nomination of Chairman Liebeler to the Federal Circuit. She has an excellent judicial temperament; she is fair, thoughtful, intellectually honest and demanding. And she has proven herself to be one of the more distinguished thinkers on international trade law in public service today.

Sincerely,

Alan O. Sykes

Alan O. Sykes
Asst. Prof. of Law

LOYOLA LAW SCHOOL

November 4, 1987

The Honorable Joseph Biden, Jr.
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to urge you to recommend the confirmation of Susan Liebeler as Judge of the United States Circuit Court of Appeals for the Federal Circuit.

Professor Liebeler and I formerly taught at Loyola Law School of Los Angeles, and during that time, when I first joined the faculty, Susan was extremely helpful to me giving generously of her time and offering me her invaluable advice on teaching and scholarship.

While Susan and I may have disagreed on some issues, both in the law and in politics, it was nevertheless always an intriguing intellectual exercise to debate with her because of her willingness to listen to other points of view. She is, in effect, open-minded. Additionally I found Professor Liebeler to be fair, informed, and courteous. And I wouldn't be writing this letter if I had not also developed a very high regard for her pragmitism and intellect. In short I am convinced that she will make an outstanding judge of the United States Court of Appeals, and therefore I strongly urge you to recommend Professor Liebeler for confirmation to the bench.

Sincerely,

Grace C. Tonner

Grace C. Tonner

C.C. Senator Strom Thurmond

LOYOLA LAW SCHOOL

October 30, 1987

The Honorable Joseph A. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing on behalf of my former colleague Susan Liebeler, who has been nominated to become a Judge of the United States Court of Appeals for the Federal Circuit.

Susan and I met in 1974, when I joined the faculty at Loyola. Over the years I got to know Susan well, and can tell you that she was an excellent friend, colleague, and professor in all of the ways which are important. She is very bright. She listens attentively to all points of view, and will change her mind if convinced by logical argument. She is very thorough in her analysis. I must add that Susan expects similar diligence from others and does not easily tolerate lack of preparation. I view this as a positive. She is a person of the highest integrity and honesty.

While on our faculty, Susan showed great concern for the students. For example, she would bring outside speakers into the classroom to help enlighten the students. She was the moving force in setting up our judicial clerkship program, and largely through her efforts, we now have many students clerking at various state and federal courts.

I have great respect for the federal court system, having clerked for the Honorable Malcolm M. Lucas (now Chief Justice of the California Supreme Court) at the United States District Court in Los Angeles. I know the high qualities of federal judges. Susan has them all.

I might add that I am not writing this letter because of politics. Susan has been nominated by a Republican President; I am a Democrat. I have never voted for a Republican. It is because I believe Susan would make a superb federal judge that I urge you and the other Senators to confirm her nomination.

Very truly yours,

David C. Tunick

David C. Tunick
Professor of Law

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EX OFFICIO

THE HONORABLE
FRANCIS X GINDHART
UNITED STATES COURT OF
APPEALS FOR THE
FEDERAL CIRCUIT
717 MADISON PLACE, NW

April 1, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Biden:

The Federal Circuit Bar Association is a national bar association consisting of 1,400 members. One of our primary responsibilities is to assure that highly qualified persons are appointed to the Court of Appeals for the Federal Circuit.

We have carefully examined the qualifications of Judge Robert Mayer and Chairman Susan Liebeler and found both to be well qualified for appointment to the Court of Appeals for the Federal Circuit. They both possess the high ability, integrity, and judicial capacity required for this important Court.

The Court is now short three judges, and we request early consideration of these nominations. If we can be of any assistance to the Committee, please let us know.

Sincerely,

Bob Wallick

Robert D. Wallick
President

RDW:tgi

cc: All members of the
Senate Judiciary Committee
The Honorable Edwin Meese, III
The Honorable Stephen J. Markman
The Honorable A.B. Culvahouse

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WRITER'S DIRECT DIAL NUMBER
(213) 688-5635

November 4, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, Senate Committee
on the Judiciary
24 Dirksen
Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I understand that the Senate Judiciary Committee is considering the nomination of Susan Leibeler to the United States Court of Appeals for the Federal Circuit and I am writing to you concerning Ms. Leibeler.

Ms. Leibeler was employed as an associate attorney for several years in a law firm in which I was a partner. Ms. Leibeler worked under my direct supervision and I believe I am qualified to express an opinion concerning her capabilities and character.

I always found Ms. Leibeler to be an extremely intelligent and capable attorney. She was open-minded, thoughtful, and worked extremely well with others as part of a team. In my opinion she certainly has a judicial temperament, and, based on my work experience with her and her development over the years, I am of the opinion that she is extremely well qualified for the judicial position for which she is being considered.

I hope you will find this letter useful in your deliberations. Please feel free to contact me if you have any further questions.

Very truly yours,

Barry R. Weiss

Barry R. Weiss

BRW/jcf

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

October 28, 1987

The Honorable Joseph Biden, Jr.
224 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I am writing to express my endorsement of Susan Liebeler, the present Chair of the United States International Trade Commission, for the open position on the United States Court of Appeals for the Federal Circuit.

Although I do not know Ms. Liebeler personally, I am familiar with her work on the ITC. One of the fields in which I teach and write at The University of Chicago Law School is international trade. I have read many decisions of the ITC, and I have been impressed over and over again with the quality of Liebeler's opinions. She brings an intellectual framework to a developing area of the law that is sorely in need of predictability and even-handed administration. Her opinions consistently display an honest and conscientious effort to grapple with the sensitive issues raised in the various trade statutes -- an effort that is helpful whether or not one agrees with every decision she has made, since it raises the general level of debate in any event. In the face of strong pressure to implement the antidumping and countervailing duty laws in a protectionist way that unduly harms U.S. consumers and U.S. industries that use imported inputs, she has tried to apply economically rational standards that result in corrective tariffs only when the legal standards are satisfied.

This experience would be directly useful on the Court of Appeals for the Federal Circuit. Perhaps even more importantly, her record convinces me that she has the ability and the energy to handle the difficult and technical issues that often face that court. I think that she would approach them with an open mind, and I therefore support her nomination.

Yours very truly,

Diane P. Wood
Assistant Professor of Law

LOYOLA LAW SCHOOL

November 3, 1987

The Honorable Joseph A. Biden, Jr.
Chairman, Senate Committee On the Judiciary
224 Dirkson Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Biden:

I understand that Susan Liebeler is being considered for the U.S. Court of Appeals for the Federal Circuit. I am writing this letter in order to add my recommendation in favor of her candidacy to the many I am sure you have already received.

She was a colleague of mine at Loyola Law School. I found her always articulate and bright. She was an individual of strong views who had the courage of her convictions. But, by the same token in my experience I found her always willing to hear the other point of view and to test her's against it. I know her strong expression of views and the insistence that other views be subject to critical examination constituted a sore point for others of my colleagues. I on the other hand felt that her contribution was a positive one. I must confess that at times one who challenges proposals may cause some feelings of discomfort. However, the product of that kind of honest and penetrating debate inevitably produces a better product.

I must also emphasize that in all disagreements she had over issues she never lowered the debate to the personal level. Her focus was always on the arguments. She could strongly disagree on issues with you but in personal matters you could depend on her loyal and concerned friendship.

She always was concerned about keeping high standards for herself and for the law school. She worked very hard (as she did in all of her tasks) in establishing a structured judicial clerkship program which has placed many students with appellate court judges, including two with the U.S. Supreme Court. She gives her best and expects quality from others.

I think she made a positive contribution to the school when she was here and will do so on the court.

Sincerely yours,

Harry Zavos

Harry Zavos
Professor of Law

ADDITIONAL SUBMISSIONS TO THE RECORD
BY SUSAN W. LIEBELER
November 12, 1987

I would like to thank Senator Leahy for chairing my second day of hearings. I hope I was able to respond satisfactorily to the issues raised by Senators Leahy, Thurmond and Grassley as they reviewed the record of my tenure at the International Trade Commission (Commission or ITC). Because time constraints prevented me from completely responding to several points raised at the hearing, Senators Leahy and Thurmond agreed that I might submit additional responses. In addition, Senators Leahy and Grassley requested that I submit certain additional material for the record.

This submission contains the following--TAB A: My further responses to an article in Law & Policy in International Business; TAB B: My comments on a report written by the Customs and International Trade Bar Association (CITBA); TAB C: In response to questions from Senators Leahy and Grassley about whether I have allowed a free trade philosophy to influence my decision-making at the Commission, a list of cases where I found that imports harmed a domestic industry; TAB D: In response to a request by Senator Leahy, a list of cases on appeal where my use of the so-called "five factor" analysis or 2.5% benchmark analysis was part of a majority vote (and thereby subject to appellate review); TAB E: In answer to Senator Leahy's questions about certain of my decisions in intellectual property cases, the citation and discussion of cases illustrating the incorporation of the Federal Circuit's decision in Corning Glass into my opinions arising under section 337; TAB F: In answer to Senator Leahy's request, the citation of the statutory section authorizing the Commission to consider the market share of imports in dumping and subsidy cases.

My comments on these points often refer to attached exhibits. Some of these exhibits are already a part of the record, but some are not. I submit the new material in response to Senator Leahy's offer to introduce additional materials into the record.

A. The Jameson Article

At the November 3, 1987 hearing, Senator Leahy referred to an article by Paul Jameson, Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique, 18 Law & Pol'y Int'l Bus. 517 (1986) (Jameson). I call the Committee's attention to two letters to the editor of the journal, an October 30, 1987 letter from Professor John McDermott (Ex. 1); and a November 2, 1987 letter from Nolan Clark, Esq., (Ex. 2) criticizing Mr. Jameson's article.

At the outset, I note that the article does not disclose that Mr. Jameson is a trade lawyer who appears frequently before the Commission as counsel for domestic firms in antidumping and countervailing duty cases or that he was counsel of record in many of the cases cited in his article. In a number of these cases, the Commission and the Court ruled against his client. This lack of disclosure obscures a possible source of bias in the conclusions he reaches.

Apart from this, however, the article also contains certain lapses in scholarship. I will discuss some of the more important ones. Mr. Jameson strongly criticizes many of my fellow Commissioners. The discussion relevant to my opinions, however, focuses on two aspects of my analysis in dumping and subsidization cases. In both situations he misstates the law. Consider first his comments on the Commission's "bifurcated analysis." Jameson, at 528-29. For some time now, the ITC has interpreted the statutory phrase "materially injured . . . by reason of the imports of that merchandise" to require us to ask two questions: whether a domestic industry has been materially injured; and, if it has, whether the material injury was caused by the dumped or subsidized goods. (The statute also deals with dumped or subsidized imports that threaten the domestic industry with material injury or materially retard the establishment of a domestic industry. I do not discuss threat or material retardation further in this statement.)

I did not invent this two step approach. The bifurcated analysis has been used by the Commission for many years and I have followed it since I joined the Commission. All the present Commissioners use the bifurcated analysis that Mr. Jameson criticizes. This procedure was sanctioned in American Spring Wire Corp. v. United States, 590 F. Supp. 1273 (Ct. Int'l Trade 1984), aff'd sub nom. Armco, Inc. v. United States, 760 F.2d 640 (Fed. Cir. 1985). Mr. Jameson criticizes the Commission for using this analysis. He acknowledges that Spring Wire was affirmed by the Federal Circuit, but states that "it was affirmed without opinion by the Court of Appeals for the Federal Circuit so we will never know the grounds for the affirmance." Jameson, at 529. What he chooses not to say, however, is that the Federal Circuit affirmed Spring Wire by adopting the opinion (and thus the reasoning) of the Court of

International Trade. It is therefore the law that binds us, and I follow it as a matter of course. Mr. Jameson's failure to understand the Federal Circuit's short decision is all the more surprising since he was counsel to the losing party on the appeal. See Armco Inc. v. United States, 760 F.2d 249, 250 (Fed. Cir. 1985).

Consider second Mr. Jameson's comments on my use of five factors in fulfilling my obligation under the statute to decide whether dumped and subsidized imports cause injury to an American industry. In my causation analysis I consider: (1) the import market share, (2) the dumping margin (or, in subsidy cases, amount of subsidy), (3) the homogeneity of products, (4) domestic price trends, and (5) barriers to entry by other foreign producers. Mr. Jameson claims that "[n]ot one of these five criteria is within the letter or the spirit of the law." Jameson, at 552.

Mr. Jameson is wrong. First, a large and increasing market share for imports is obviously an indication that American industry may be getting hurt. Congress specifically directed the ITC to "consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. §1677(7)(C)(1). (Emphasis added.) "Market share" is nothing more than import volume relative to production or consumption in the United States.

Foreign producers who take an increasing share of the market from American competitors are much more likely to be harming them than are foreigners who hold a constant or declining market share.

My second factor is the dumping margin. Although this is not specifically mentioned in the statute, its use by the Commission has been specifically upheld by the Court of International Trade in Hyundai Pipe Co. v. United States, No. 84-6-00763 (Feb. 23, 1987). There the Court ruled that "the Commission is not barred from examining margins in carrying out its duties under the 1979 Trade Act." Slip op. at 8. Mr. Jameson was intimately familiar with Hyundai; he was counsel for amicus curiae on the case.

The reason for considering the size of the margin is simple: The more a foreign firm sells its product in the United States below its home market price, the greater is the probability that it is engaging in price undercutting, a factor specifically listed in the statute. See 19 U.S.C. §1677(7)(C)(ii). Undercutting itself is important because it tends to reduce the price the American industry will be able to charge and ultimately harms the industry. But trying to find direct evidence of price undercutting is difficult -- products that look somewhat alike are often different in terms of quality, service, or warranties. Thus, as a factfinder, I have to consider whether price undercutting is taking place by looking for indirect evidence, just as one looks at skid marks when there are no eyewitnesses to a car accident. Mr. Jameson himself recognizes the error of his claim that there is no legal basis for consideration of dumping margins by correctly noting in a footnote on page 571, that Hyundai upheld the use of margins analysis.

My third factor is the homogeneity of products. This tells me how easy it is to substitute the American and imported product for one another and helps me to assess the impact of imports on domestic prices and domestic producers under 19 U.S.C. §1677(7)(B)(ii) and (iii). Product homogeneity is relevant because the more two products are alike, the more likely it is that a consumer will choose an imported product in lieu of a domestic one on the basis of small price differences. For example, a small change in price for a truly homogeneous product like wheat can produce a large shift in market share. Since the statute requires a decision on whether the price effects of foreign goods are "significant," I believe I must consider how substitutable the products are. This is why product homogeneity is a "relevant economic factor" under section 1677(7)(C)(iii) and an "other factor" under section 1677(7)(B). No court has ever held to the contrary.

My fourth factor is price trends. If prices are decreasing, it is quite possible that the increased volume of imports is causing the decline in prices, and hence harming the

American industry. And, again, Congress has specifically directed the Commission to examine the effects of dumped or subsidized goods on U.S. prices. See 19 U.S.C. §1677(7)(B)(ii).

Finally, I consider barriers to entry by other foreign producers. The reason for this is, again, a simple desire to carry out Congress' intent, which is to protect American industry only from unfair foreign competition, not all foreign competition. If it turns out that in a particular case there are few obstacles to fair foreign competition, then the harm suffered by the American industry is more likely to be caused by the fact that foreign competition exists, not by whether that competition is fair or unfair. Examining barriers to entry also provides important information about what would happen if a dumping order were imposed. If the answer is nothing, then it is not the dumped imports that are causing the injury.

I would like to stress to the Committee that each of these five factors is just a tool I use to determine whether the price and volume of imports are "significant"; i.e., whether they are causing harm to American industry. Other Commissioners have different ways of trying to answer this same question. To me the question appears to be similar to the problem of causation in an ordinary tort case. Because of the absence of direct evidence, the economic factors discussed above are useful in trying to untangle the facts and discover whether the dumped or subsidized imports actually caused material injury to the domestic industry.

B. The CITBA Report

It is very important for rigorous investigation to be conducted when considering someone for a lifetime appointment. Those who receive such appointments should be held to high standards of professional and personal conduct. But they should also be treated in a fair and evenhanded manner by those who take it upon themselves to assist in this investigative process.

Following my nomination several bar associations evaluated my qualifications. The ABA Standing Committee on the Federal Judiciary was unanimous in its opinion that I was "qualified." The Federal Circuit Bar Association found me well qualified for appointment to the Federal Circuit and testified in support of my nomination on November 3, 1987. (Their testimony is included in Ex. 6.) The ITC Trial Lawyers Association endorsed my nomination in testimony given at that hearing. (Their testimony is included in Ex. 6.) Another bar association, CITBA, expressed concern about my judicial temperament.

CITBA testified at my November 3, 1987 hearing before the Senate Judiciary Committee and submitted the "Report of the Board of Directors of the Customs and International Trade Bar Association on the Nomination of Susan Wittenberg Liebeler to the United States Court of Appeals for the Federal Circuit" (CITBA Report). In response to a question from Senator

Thurmond, Mr. David Elliott, testifying on behalf of CITBA, stated the CITBA did not question my intellectual capacity or integrity. Mr. Elliott stated that CITBA's only area of concern was with my judicial temperament and the reasons for that concern were set forth in the CITBA Report.

The report and testimony presented by CITBA contained significant factual errors and also misrepresented my reasoning in opinions, and in one case the date of an opinion, written during my tenure at the Commission. The presentation of the circumstances surrounding an unfortunate incident in Vermont in 1973 which primarily involved my spouse was decidedly one-sided, as were the descriptions of my reputation in the Loyola Law School community, in the trade community and at the Commission.

Most surprising is the fact that representatives of CITBA made no effort to interview me concerning their concerns or the negative allegations contained in their report. Many months ago I met with members of their Judicial Selection Committee in my office and we discussed briefly my causation analysis in antidumping and countervailing duty cases. I was not asked to respond to any of the negative allegations set forth in the CITBA Report.

I appreciate the opportunity the Committee has given me to respond to the CITBA Report. I will address each of its four sections in turn.

1. Interviews with Commissioners and Practitioners

The CITBA Report states that the CITBA Judicial Selection Committee interviewed all Commissioners who served with me on the Commission, as well as numerous attorneys who practice before the Commission and Commission personnel. CITBA does not disclose in its report the names of the interviewees, the length and type of interviews, the questions asked, or the context in which the responses they report were made. I call the Committee's attention to the November 10, 1987 letter to Chairman Biden from Vice Chairman Brunsdale of the International Trade Commission (Ex. 3). The Vice Chairman describes her "interview" with a CITBA representative as a brief telephone call in which she was was asked very few questions. She states that she was not asked to respond to any criticisms that might have been leveled at me and that she was not asked to comment in any detail on my working relationship with her.

The Commission is a collegial body and each Commissioner brings his or her own experience and professional training to bear on the issues before it. It is not surprising that there are substantial differences and disagreements among the Commissioners and staff on many of the important and difficult issues which the Commission must address under the import relief laws.

Like some other collegial bodies, the Commission has a history of disagreement among Commissioners. Indeed dissension at the Commission in past times reached such a level that Congress was forced to address the issue.

A 1977 House Report, for example, noted that there had been "a completely unwarranted amount of time spent by Commissioners debating minor administrative or personnel matters" and that the "inability of the Commissioners to agree among themselves" had severely damaged effective agency administration. See H. Rep. No. 95-217, 95th Cong., 1st Sess., at 2, 6 (1977). More specifically, the House Ways and Means Committee noted that: "[T]he amount of hours the Commission has spent failing to decide on minor administrative matters is poor management. The dissension created ultimately impacts on the substantive work of the Commissioners and their ability to function as a Commission. The attention in public to minutiae cheapens the professional product of the Commission in the domestic and foreign trade communities." Id. at 9 (emphasis in the original). Similar concerns have also been raised by the Senate Finance Committee and by individual members of Congress. See e.g, Congressional Record, April 25, 1977 at H 3486, statement of Congressman Vanik); S. Rep. No. 95-122, 95th Cong., 1st Sess. at 5; Congressional Record, May 17, 1977 at S 7829 (statement of Senator Curtis).

The highly controversial nature of the issues with which the Commission deals lend themselves to strong differences of opinion. Moreover, members of the Commission frequently come from different types of backgrounds (indeed differences in political affiliation are statutorily mandated). In short, disagreement within the ITC is neither new nor unexpected.

CITBA also reports some negative statements made by some members of the trade bar. It is, of course, impossible for me to respond to such comments without knowing the questions asked, the persons to whom they were addressed, and the sampling methods used to select the interviewees. However, I ask the Committee to consider the written testimony and statements submitted by such leading members of the trade bar as Richard O. Cunningham, Esq., Steptoe and Johnson, Washington, D.C., member of the Standing Committee on Customs Law and Vice Chairman of the Committee on Customs Law, Administrative Law Section, American Bar Association; Past Chairman, Committee on International Litigation and Current Chairman, Committee on Legislation, American Bar Association (Ex. 5); and John Greenwald, Esq., Wilmer Cutler & Pickering, former Deputy General Counsel, United States Trade Representative; former Deputy Assistant Secretary for Trade Administration, Department of Commerce (included in Ex. 6).

In addition I request the Committee to consider the favorable testimony presented at my November 3, 1987 hearings by Clarence Kipps on behalf of the Federal Circuit Bar Association (included in Ex. 6); Robert S. Swecker on behalf of the ITC Trial Lawyers Association (included in Ex. 6); and Professor Warren Schwartz of the Georgetown University Law Center (Ex. 11). Many other members of the trade bar and trade community, as well as other professors teaching courses in trade law, have commented favorably on my nomination, my competence, my integrity and my temperament. I call the Committee's attention to the following letters and statements, attached collectively as Exhibit 6:

(1) October 30, 1987 letter to Chairman Biden from Prof. William P. Alford, UCLA School of Law. .

(2) July 24, 1987 letter to Chairman Biden from Prof. Jonathan B. Baker, Amos Tuck School of Business Administration, Dartmouth College; formerly with Foley & Lardner, Washington, D.C.

(3) July 29, 1987 letter to Chairman Biden from James N. Bierman, Esq. of Foley & Lardner, Washington, D.C.

(4) November 9, 1987 letter and written statement to Chairman Biden from Richard Cunningham, Esq. of Steptoe & Johnson, Washington, D.C.; member of the Standing Committee on Customs Law and Vice Chairman of the Committee on Customs Law, Administrative Law Section, American Bar Association; Past Chairman, Committee on International Litigation and Current Chairman, Committee on Legislation, American Bar Association. (Also appears as Ex. 5).

(5) July 31, 1987 letter to Chairman Biden from Pierre F. de Ravel D'Esclapon, Esq., Donovan Leisure Newton & Irvine, New York.

(6) November 3, 1987 testimony of the Federal Circuit Bar Association before the Senate Judiciary Committee. (Also appears as Ex. 4)

(7) November 3, 1987 testimony of John Greenwald, Esq., Wilmer, Cutler & Pickering.

(8) November 3, 1987 testimony of ITC Trial Lawyers Association.

(9) October 28, 1987 letter to Chairman Biden from Prof. Fred S. McChesney, University of Chicago Law School, formerly with Steptoe & Johnson, Washington, D.C.

(10) October 29, 1987 letter to Chairman Biden from Prof. John T. McDermott, Loyola Law School.

(11) August 4, 1987 letter to Chairman Biden from Tom M. Schaumberg, Esq., Howrey & Simon, Washington, D.C.

(12) August 3, 1987 letter to Chairman Biden from Congressman Dick Schulze, member of the House Subcommittee on Trade of the Committee on Ways and Means which has oversight responsibility for the International Trade Commission.

(13) August 11, 1987 letter to Chairman Biden from Prof. Alan O. Sykes, University of Chicago Law School; formerly with Arnold & Porter, Washington, D.C.

(14) November 4, 1987 letter to Chairman Biden from Prof. Alan Swan, University of Miami Law School.

(15) October 28, 1987 letter to Chairman Biden from Prof. Diane P. Wood, University of Chicago Law School.

(16) August 7, 1986 letter to the Honorable Susan Liebeler from a group of individuals interested in trade policy.

2. Interviews with Members of the Loyola Community

The Report states that the CITBA Judicial Selection Committee conducted interviews of members of the former student body, faculty and administration of Loyola Law School. According to the Report a series of unnamed persons offered negative comments about my performance at Loyola and my fitness for appointment to the bench. Again, CITBA never contacted me to discuss their concerns, and I do not know to whom the CITBA Committee spoke about my performance at Loyola.

I remain in contact with many of my former colleagues and students. While many of them were contacted by the ABA and by the FBI, none of them indicated that they were ever contacted by CITBA. During the course of my tenure at Loyola, I taught more than 2000 students. It would not surprise me that some students might criticize me. It would surprise me, however, that any type of fair sampling of members of the Loyola community would result in the uniformly negative comments reported by CITBA.

I joined the Loyola Law School faculty in 1973 as an untenured member. Before receiving tenure in 1979, my teaching, scholarship and relationships with students, faculty and administrators were thoroughly reviewed by the tenured faculty, by the law school administration and by the University President. In my many years at Loyola I worked closely with many student research assistants as well with as members of the law review staff. As head of the law school's judicial clerkship program, I also worked closely with more than 200 students in connection with their applications for judicial clerkships. In addition, I served with many of my colleagues on various faculty committees, including the Curriculum Committee, the Tenure Review Committee, the Student Faculty Relations Committee, and the Faculty Recruiting Committee. I spent a large portion of my professional life at Loyola Law School and I have never heard anyone make statements about my attitudes, teaching, or relationships with my colleagues or students of the kind reported by CITBA.

It is, of course, impossible for me to respond to unattributed quotes from unnamed persons, particularly when I do not know the context of the remark or the questions to which the statements were addressed. Instead I call the Committees' attention to the following letters from members of the Loyola Law School community who comment favorably on my performance at Loyola and my fitness for the appellate court:

a. Former and present faculty and administrators (Ex. 7):

(1) October 30, 1987 letter to Chairman Biden from Theodore A. Bruinsma, Esq., former Dean, Loyola Law School; President, University Technology Transfer, Inc.

(2) November 4, 1987 letter to Chairman Biden from Prof. Charlotte K. Goldberg, Loyola Law School.

(3) November 4, 1987 letter from Samuel H. Gruenbaum, Esq., Cox, Castle & Nicholson, Los Angeles; former Adjunct Professor, Loyola Law School.

(4) November 5, 1987 letter to Chairman Biden from Prof. Malvina Halberstam, Benjamin N. Cardozo School of Law, Yeshiva University; formerly Professor, Loyola Law School.

(5) November 2, 1987 letter to Chairman Biden from Prof. Michael Josephson, Loyola Law School; President, Josephson Institute for the Advancement of Ethics.

(6) November 5, 1987 letter from Prof. Gideon Kanner, Loyola Law School.

(7) November 5, 1987 letter to Chairman Biden from Roberta M. Klein, Esq., former Instructor, Loyola Law School.

(8) October 20, 1987 letter to Chairman Biden from Dean Travis H. D. Lewin, Syracuse Law School; formerly Visiting Professor, Loyola Law School

(9) October 29, 1987 letter to Chairman Biden from Prof. John McDermott, Loyola Law School.

(10) November 4, 1987 letter to Chairman Biden from Martha S. Robinson, Esq., Professor Emeritus, Loyola Law School.

(11) November 6, 1987 letter to Chairman Biden from Prof. Dan S. Schecter, Loyola Law School.

(12) November 4, 1987 letter from Minda R. Schecter, Esq., Graham & James, Los Angeles; formerly Professor, Loyola Law School.

(13) November 9, 1987 letter to Chairman Biden from Lloyd Tevis, former Dean and Professor Emeritus, Loyola Law School.

(14) November 4, 1987 letter to Chairman Biden from Prof. Grace C. Tonner, Loyola Law School.

(15) October 30, 1987 letter to Chairman Biden from Prof. David C. Tunick, Loyola Law School.

(16) October 30, 1987 letter to Chairman Biden from Prof.Harry Zavos, Loyola Law School.

b. Former students of Loyola Law School (Ex. 8):

(1) November 4, 1987 letter to Chairman Biden from Jean M. Arnwine, Esq., O'Melveny & Myers, Los Angeles.

(2) October 30, 1987 letter to Chairman Biden from Janet T. Davidson, Esq., Paul, Hastings, Janofsky & Walker, Los Angeles.

(3) November 5, 1987 letter to Chairman Biden from D. Annette Fields, Esq., Debevoise & Plimpton, Washington, D.C.

(4) November 4, 1987 letter from Samuel H. Gruenbaum, Esq., Cox, Castle & Nicholson, Los Angeles; former Adjunct Professor, Loyola Law School.

(5) November 4, 1987 letter to Chairman Biden from Dean B. Herman, Esq., Ervin, Cohen & Jessup, Beverly Hills.

(6) November 4, 1987 letter to Chairman Biden from Katherine A. Lind, Deputy County Counsel for the County of Riverside, California.

(7) November 4, 1987 letter to Chairman Biden from Linda S. Masada, Fierstein & Sturman, Los Angeles.

(8) November 5, 1987 letter to Chairman Biden from Adam Seigler, Esq., Jones Day Reavis & Pogue, Los Angeles.

(9) November 3, 1987 letter to Chairman Biden from Julie Sulman, Esq., Rancho Palos Verdes, California.

(10) November 4, 1987 letter from Gregory B. Thorpe, Esq., O'Melveny & Myers, Los Angeles.

3. Commission Opinions

The CITBA Report also alleged that I decide cases based on my personal beliefs of what the law ought to be rather than on the basis of statutes enacted by Congress. The Report points to some of my opinions in countervailing duty and antidumping cases and in cases decided under Section 337 of the Tariff Act of 1930 as decisions not made in accordance with governing statutes. As I indicated to Senator Leahy in response to questions he raised on this issue, I believe that my analysis and decisions in these cases are consistent with the controlling statutes.

The Report claims that I require predatory intent in countervailing duty and dumping cases and ignore the statutory criteria. I refer the Committee to my November 3, 1987 testimony where I explained that I do not require predatory intent and that I utilize all the statutory criteria in making my injury and causation determinations.

Section 771(7) of the Tariff Act of 1930 identifies seventeen specific factors to be "considered" or "evaluated" by the Commission in each dumping or countervailing duty investigation. Fifteen of them relate to the domestic industry and its products: prices, output, sales, profits, productivity, return on investment, market share, capacity utilization, cash flow, inventories, employment, wages, growth, ability to raise capital and investment. Two relate explicitly to the dumped or subsidized imports: import volume and import prices.

Like my colleagues on the Commission, I evaluate thirteen of the fifteen factors in my consideration of the condition of the industry. I evaluate the remaining two of the fifteen factors (market share and domestic prices) primarily in the context of causation. (They may also be considered when "evaluating" the condition of the domestic industry.) Two factors --domestic prices and import volume (for example, import market share)--play a central role in my causation analysis as they do for other Commissioners. (*See*, *e.g.*, *Certain Line Pipes and Tubes from Canada*, Inv. No. 731-TA-375 (Preliminary), USITC Pub. 1965, at 13-23 (March 1987)(Views of Commissioners Seeley Lodwick and David Rohr); *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and the Netherlands*, Invs. Nos. 701-TA-275-278, 731-TA-327-331 (Final), USITC Pub. 1956, at 31-33, 36-37, 37-39 (March 1987) (Views of Commissioners Eckes, Lodwick and Rohr); *Stainless Steel Pipes and Tubes from Sweden*, Inv. No. 701-TA-281 (Final) USITC Pub. 1966, at 33-43 (Oct. 1986) (Additional views of Commissioner David B. Rohr); *Certain Stainless Steel Butt-Weld Pipe Fittings from Japan*, Inv. No. 731-TA-376 (Preliminary), USITC Pub. 1978, at 12-15 (May 1987) (Views of the Commission).)

Nowhere in the statute is the Commission instructed how to "evaluate" or "consider" these factors. The statute also instructs the Commission to consider "other factors" (19 U.S.C. §1677(7)(B)) and "other relevant economic factors." (19 U.S.C. §1677(7)(C)(iii)).

As I mentioned in the first section of this submission, the Commission has, at least since American Spring Wire, consistently asked the question of whether an industry is materially injured before it moves on to the more difficult question of whether that injury is being caused by imports. I usually agree with the other Commissioners about whether an industry is materially injured. Moreover, the fact that I have often found both material injury and causation by imports (see TAB C below) shows that I do not require predatory intent.

CITBA criticizes my five factor causation analysis. I have discussed this in my reply to the Jameson article, supra, and I will not repeat that discussion here. I have used that analysis to carry out Congressional intent in an attempt to isolate the effects of dumped or subsidized goods on the domestic industry. Other Commissioners also struggle with the rather difficult responsibility of assessing causation and some follow more informal, intuitive approaches. I use a more formal economic approach, and as a result, my causation analysis is clearly stated and predictable. I believe that this more formal analysis and reasoning facilitates judicial review and Congressional oversight.

On this point I ask that the Committee consider the statement submitted to the Committee by one of the country's leading trade lawyers, Richard O. Cunningham (Ex. 5):

> CITBA's attack on Commissioner Liebeler's trade case opinions shows, upon even the most cursory examination, no instance in which she has disregarded statutory criteria or statutorily-enumerated economic factors. Rather, each instance cited by CITBA boils down to either (a) consideration by Commissioner Liebeler of other relevant economic facts not specifically enumerated in the statute, or (b) a case in which the Commissioner considered a statutorily-enumerated economic factor, but reached a factual conclusion as to that factor different than the conclusion CITBA would have reached. In short, Commissioner Liebeler scrupulously adhered to the statute, but weighed the evidence differently than CITBA seems to have wanted.
>
> It must be remembered that these statutes are replete with such terms as "significant" and "material". Over the years, individual Commissioners have had widely varying assessments of what is "significant" and what is "material". Some Commissioners have been prone to find "significant" a relatively low quantum of import volume or price effect, while other Commissioners have required a stronger showing. Such variances are inherent in the nature of the Commission's fact analyzing role, and there is nothing injudicious in that. It seems clear that all of CITBA's concerns about Commissioner Liebeler relate to her position on this wholly permissible spectrum of economic fact analysis. Not only are these concerns irrelevant to issues of "impartiality" or "judicial temperament", they are wholly irrelevant to Ms. Liebeler's present nomination. On the Court of Appeals, she will be ruling on issues of law, not weighing the facts.

Another criticism by CITBA is that I have refused to cumulate the volume, price, and impact of dumped imports with subsidized imports. This is referred to in trade law as "cross-cumulation." Cross-cumulation was, until recently, a very unsettled issue.

Prior to 1984, it was not Commission practice to cumulate imports. The 1984 amendments mandating cumulation of certain imports were silent on the issue of cross-cumulation. None of the Commissioners cross-cumulated in cases covered by the 1984 amendments until Bingham & Taylor v. U.S., 627 F. Supp. 793 (Ct. Int'l Trade 1985), where the Court of International Trade held that the Commission should cross-cumulate. The Commission was unanimous in its decision to appeal the case to the Federal Circuit. While that case was on appeal, some Commissioners cross-cumulated and some did not. See e.g. Certain Brass Sheets and Strips, 701-TA-269 and 270 (Preliminary), USITC Pub. No. 1837 at 11, notes 27-28 (May 1986) where three commissioners (Commissioners Stern, Brunsdale and Liebeler) did not cross-cumulate.

Indeed, when the issue finally reached the Federal Circuit, in Bingham & Taylor v. United States, 815 F.2d 1482 (1987), the court recognized that "[t]he Commission as an entity never cross-cumulated." Id. at 1485. The Federal Circuit recognized the difficulty of interpreting the 1984 amendment that inaugurated the problem: "We find the statutory language suffers from some ambiguity . . . ." Id. In the end, though, the Federal Circuit decided that the common character of dumped and subsidized imports as unfair entrants into the U.S. market should prevail over their differences. The court felt more comfortable than usual in not deferring to the Commission on the issue, because the case was one of first impression. Id. at 1487. I, of course, have since followed the Federal Circuit's opinion in every case.

The CITBA Report contains serious misstatements and mischaracterizations of my written opinions. One example occurs at page 10 of the Report:

> "Thus, in Agricultural Tillage Tools from Brazil, Inv. No. 701-TA-223 (Final), USITC Pub. No. 1761 at 24-27 (Oct. 1985), she found to be legally insignificant a 15.9 percentage point increase in market share by subsidized imports, an 8.06 percent subsidy rate, and a price decline in one of two sizes of the merchandise under consideration because ....

Nowhere in Tillage Tools did I characterize the market share, subsidy, or price decline as legally insignificant. Instead I stated that:

> There is substantial variation among discs of the same diameter, there has been no significant decline in disc prices, and discs from Brazil account only for a portion ofimports of discs. In light of the nonfungible nature of discs, a subsidy of 8.06 percent ad valorem is not very large. Thus, although there has been substantial growth in imports from Brazil, and Brazil now has a moderate share of the United States market, the second through fifth factors compel me to conclude that imports of discs subsidized by the government of Brazil do not materially injure or threaten...the domestic industry....(emphasis added).

Agricultural Tillage Tools from Brazil, Inv. No. 701-TA-223 (Final) USITC Pub. No. 1761 at 27 (Oct. 1985) (Additional and Dissenting Views of Vice Chairman Liebeler).

CITBA also confuses or misstates the price data collected by the Commission. The Commission staff report in that case contained price information on five common tillage tool specifications. Most of that information was confidential. In addition, I noted that there were substantial differences among discs of the same diameter and that the products under investigation were not very homogeneous. Id.at 26. After considering the price information and noting that the various products were not fungible I concluded on the basis of confidential information that there had been no significant decline in prices. Id. Since CITBA presumably did not have access to the confidential information, I do not know the basis for their assessment of the price data available to the Commission.

The second group of my decisions that CITBA criticizes involves section 337, a section of the trade laws that serves mainly to protect the owners of American patents, copyrights, and trademarks from foreigners who would pirate them. CITBA claims that I ignore Congress' requirement that an American industry be injured before it can receive relief from the Commission. CITBA is wrong.

I call the Committee's attention to the November 9, 1987 letter to Senator Leahy from Herbert C. Wamsley, Executive Director, Intellectual Property Owners, Inc. (IPO) (Ex. 15). Mr. Wamsley comments on pages 13-16 of the CITBA Report, the section pertaining to my opinions under Section 337. IPO criticizes CITBA's analysis of my opinions and concludes that I have followed the statute and court interpretations of it.

The CITBA Report (at page 13) asserts that I employ a per se injury standard and, as support for this assertion, quotes from my opinion in Waveguide Fibers. The assertion is incorrect. The quotation from my opinion clearly recognizes that the Commission must employ a injury test but suggests that in patent cases the Commission should employ its most lenient injury test. Moreover, the quotation from my opinion is incomplete and misleading. It omits, without signifying an omission, an important footnote at the end of the second sentence which states:

> "Both this court and the ITC have acknowledged that the quantum of proof of injury is less in the context of patent, trademark, or copyright infringement...than in other types of unfair trade practices, because the holder of the former type of rights is entitled to exclude competitors entirely from using the intellectual property covered by those rights." Textron Inc. v. USITC, 753 F. 2d 1019, 1029 (Fed Cir. 1985).

I discuss Textron elsewhere in my thirteen page dissent. Nowhere in my opinion do I read the injury requirement out of section 337. Indeed, as is pointed out by IPO (Ex. 15) a large part of my opinion is directed to the issue of whether Sumitomo's U.S. sales, although small, posed a real threat to the domestic industry.

The Report cites my opinion in Certain Woodworking Machines, Inv. No. 337-TA-174 and states that I issued my opinion nine months after the Federal Circuit's ruling in Corning Glass Works v. United States, 799 F.2d 1559 (Fed. Cir. 1986). The report is wrong. As I testified at my November 3, 1987 hearing, Corning was not discussed in my opinion in Woodworking Machines because Corning was decided on August 27, 1986, some ten months after the Commission decided Woodworking Machines on June 16, 1985. The Commissioners' opinions were issued in October 1985. The date of the Commission decision is clearly set forth on the first page of the Commission report. I do not know why CITBA misstated the date of my opinion. CITBA's error has also been called to the Committee's attention by Richard O. Cunningham, Esq. (Ex. 5), by John Greenwald, Esq. (included in Ex. 6) and by IPO (Ex. 15).

I think the question in any particular case of how much injury is enough is very difficult, but I rely heavily, as a Commissioner should, on the opinions of the Federal Circuit to guide me. CITBA is incorrect is asserting that I do not follow the Federal Circuit.

I have attached, as Exhibits 9 and 10, copies of my opinions in Certain Optical Waveguide Fibers, Inv. No. 337-TA-189, USITC Pub. No. 1824 and Certain Unitary Electromagnetic Flowmeters with Sealed Coils, Inv. No. 337-TA-230. In Fibers I deliberated at length on the Federal

Circuit's decision in Textron, Inc. v. United States, 753 F.2d 1019 (Fed. Cir. 1985); in Flowmeters I did the same with the Federal Circuit's decision in Corning Glass Works v. United States, 799 F.2d 1559 (Fed. Cir. 1986).

The trade laws which govern Commission decisions require analysis and interpretation of complex financial and technical data. The governing statutes give the Commission considerable discretion in evaluating this information. Thus it is not surprising that reasonable minds differ over issues arising under these laws. It is not uncommon for members of the Commission to criticize the decisions of their colleagues as being outside the statutory framework.

A recent example is the Commission's decision in Certain Dynamic Random Access Memories, Inv. No. 337-TA-242 (1987). The Commission found that certain dynamic random access memory chips (DRAMs) manufactured by Samsung infringed certain patents held by Texas Instruments. The Commission majority, of which I was a member, recommended an order excluding from importation into the United States infringing DRAMs as well as a wide range of downstream products containing the infringing DRAMs. The minority contended that only infringing DRAMs, and not downstream products containing them, should be excluded. They claimed that the exclusion order recommended by the majority was contrary to section 337. On the other hand, the majority recommendation has been enthusiastically supported by some members of Congress on the grounds that it provides the protection to the domestic industry contemplated by the statute.

As I mentioned earlier many professors teaching trade law, trade lawyers and other members of the trade community have commented favorably on my opinions and believe them to be fully consistent with governing statutes. Their comments are contained in Exs. 4, 5, 6, 11, and 15.

4. The Vermont Arrest

Over the past several months, during which I have appeared before the Senate Judiciary Committee on two occasions, I have been called upon to answer serious allegations regarding my personal behavior during events occurring more than fourteen years ago in Vermont.

In response to a question in the ABA and Judiciary Committee questionnaires for judicial nominees asking whether I have ever been arrested, I disclosed that more than fourteen years ago I had been charged in Vermont with extortion and being an accessory to extortion, that I was never prosecuted, and that the charges were dropped. I have always believed that the charges had no basis in law or fact.

In late 1971, my husband purchased a dilapidated and abandoned Oddfellows Lodge located on the town common in Newfane, Vermont. During his one year sabbatical leave from UCLA Law School, he worked full time to restore this property and convert it into apartments. Both my husband and I were teaching law school and my husband invested in the building in the hope of providing a future source for his two young sons' college tuition. The restoration and purchase were financed by the Burlington Savings Bank and the rents were used to pay the mortgage.

In the summer of 1973, shortly after the restoration was completed, a dispute arose between my husband and one of the tenants in the apartment building. This tenant, who was employed and financially able to pay rent, stopped paying his rent.

Our financial situation at that time was such that my husband would not have been able to make the mortgage payments without the rent from the apartments. He had thus told this tenant that he would lose the building without the rent and had asked the tenant either to vacate the premises or pay his rent. The tenant told him that he would never pay any more rent and refused to move out of the building. My husband told the tenant that he would remove the tenant's possessions from the apartment pursuant to a provision in the lease which incorporated the rights of innkeepers under the Vermont innkeeper's lien law and gave the landlord the right to remove the tenant's possessions in the event of non-payment of rent.

My husband was very upset with this tenant and his problems with this tenant had taken over our dinner table conversations. In an attempt to be helpful, I spoke with the tenant and asked him to either pay rent or leave the building. The tenant told me that he had been to see Jerome Diamond, a lawyer in Brattleboro, Vermont and that Mr. Diamond had told him that he had the right to stay in the apartment rent-free for several months while the landlord tried to evict him through court proceedings.

Because I believed that Mr. Diamond was representing the tenant, I went to his office in Brattleboro to see if I could help my husband work this matter out. I spoke to Mr. Diamond and offered to forgive the back rent and pay some or all of the tenant's moving expenses if the tenant would vacate the premises. Mr. Diamond told me that this was not acceptable and that in his view the tenant was entitled to remain in the apartment and not pay rent while my husband went to court to try to evict him. I called Mr. Diamond's attention to the provision in the lease giving the landlord the right to enter the premises and remove the tenant's possessions in the event of non-payment of rent. Mr. Diamond told me that that in his view such provisions were invalid, but he was unable to cite any precedent to support this position.

While I was aware that Mr. Diamond was the State's Attorney, I believed, based on his conduct and statements, that he was also speaking as the lawyer for the tenant. Both he and the tenant acted as if Mr. Diamond were representing the tenant.

My husband was and is a lawyer. He told me that he had researched the Vermont law and determined that the lease provision in question was valid and decided to remove the tenant's belongings from the apartment as provided in the lease. The decision to remove the tenant's belongings was my husband's alone and was certainly not made in reliance on any advice from me. My husband used his key and entered the tenant's apartment, changed the lock, removed the tenant's belongings and placed them in a commercial moving and storage warehouse in the name of the tenant. There was no attempt made to hold the possessions to induce payment of back rent. My husband gave the warehouse receipt to the tenant. Later that day my husband was involved in a scuffle with the tenant.

My husband was the landlord, not me. He was also an experienced lawyer and law professor. Contrary to Mr. Diamond's assertions, my involvement in these events was limited. While I discussed my meeting with Mr. Diamond with my husband and we discussed the lease provision in question, my recollection is that I saw Mr. Diamond on only one occasion and that our meeting lasted less than twenty minutes. While I accompanied my husband during two trips to the apartment and I had previously spoken with the lawyer whom I believed was representing the tenant, my involvement in this matter was that of a supportive spouse, not that of an attorney at law.

My recollection of these unpleasant and embarrassing events is vague. This incident occurred approximately ten weeks before the birth of my daughter. Because I had lost a baby in a previous pregnancy in 1972, I was especially careful not to take any chances and avoided lifting and carrying. It is most unlikely that I would have been actively involved in the removal of the tenant's possessions.

The problem with the tenant, the removal of the possessions and the scuffle involved principally my husband's conduct, not mine. I was, at most, tangentially involved. I have always believed that there was no basis in law or fact for the criminal charges against me. I am surprised that a group of lawyers would presume to comment on my questionnaire disclosure, my conduct and my August 3, 1987 testimony concerning this matter, without interviewing anyone except the lawyer on the other side of the case.

I regret that CITBA found my explanation of these events "too facile and unsatisfactory." Again, CITBA never spoke to me about the incident and according to John Rocray, the attorney who represented me, CITBA did not contact him. I discussed the Vermont incident extensively in my August 6, 1987 hearing in response to Senator Leahy's questions. I refer the

Committee to that testimony and to the September 16, 1982 letter from Mr. Rocray (Ex. 12). If the Committee has additional questions or concerns about these matters, I will be pleased to answer them. I trust that the Committee will consider both sides of this matter, something that CITBA did not do.

C. Cases Where I Found that Imports Caused Injury

At the November 3, 1987 hearing Senator Grassley asked whether I decided cases according to the law and not in accordance with some preconceived ideology. I referred the Senator to the many cases in which I have found that imports were harming American industry. He asked me to submit for the record a list of such cases. Although I do not decide cases with the intent of building up statistics of one sort or another, I have reviewed all my final determinations in antidumping and countervailing duty cases, and in section 201 cases, and have found numerous instances where I determined that imports were harming American industry despite what might be my general preference for free trade. A list is attached as Ex. 13.

D. Cases on Appeal Where My Analysis is Subject to Review

Senator Leahy requested that I supply the Committee with a list of cases where either the five factor analysis or 2.5% benchmark are one appeal. To the best of my knowledge, there are six such cases:

1. Chaparral Steel Co. v. US, Ct. No. 85-12-01767 (CIT), challenging Carbon Steel Structural Shapes from Norway, 731-TA-234(F).

2. Copperweld Corp. v. US, Ct. No. 86-03-00338 (CIT), challenging Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada, 731-TA-254 (F).

3. Maverick Tube Corp. v. US, Ct. No. 87-04-00636 (CIT), challenging Certain Line Pipes and Tube from Canada, 731-TA-375 (P).

4. National Ass'n of Mirror Manufacturers v. US, Ct. Nos. 87-02-00271 and 87-04-99592 (CIT), challenging Certain Unfinished Mirrors from FRG, Italy, Japan, Portugal, and UK, 731-TA-321-325 (F).

5. USX v. US, Ct. No. 85-3-000325 (CIT), challenging Certain Carbon Steel Products from Argentina, 731-TA-169 (F).

6. Wieland Werk AG, et al. v. US, Ct. No. 87-04-00575 (CIT), challenging Brass Sheet and Strip from W. Germany, 731-TA-317(F).

E. The Corning Glass Decision in My Opinions

One of the criticisms made by CITBA is my supposed refusal to adhere to precedent in section 337 cases. As I pointed out at the hearing and at TAB B above, this charge appears to be based on CITBA's mistake in failing to realize that Corning Glass came out several months after one of my opinions was issued. Senator Leahy nevertheless offered me the opportunity to submit for the record a list of my 337 opinions where I applied the holding of Corning Glass.

Corning Glass came out on August 27, 1986. Since then, the Commission has apparently revisited the issue twice. The first time was about two months after Corning Glass, in Certain Unitary Electromagnetic Flowmeters with Sealed Coils, Inv. No. 337-TA-230. I dissented in that case, and my opinion contains an extensive discussion of how Corning Glass applied to the case. It is attached as Ex. 10. The second time was in Certain Dynamic Random Access Memories, Inv. No. 337-TA-242 (Sept. 21, 1987). I was part of the majority in this case on the injury issue. That part of the opinion applying Corning Glass is attached as Ex. 14.

F. Market Share Under the Statute

At the November 3, 1987 hearing, Senator Leahy asked me for the specific section authorizing the Commission to consider market share. Market share is a shorthand for import volume relative to total production or domestic consumption. The relevant section is 19 U.S.C. §1677(7)(C)(i) which states that "[i]n evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." (Emphasis added.)

Conclusion

Finally, I want to thank the Committee for the opportunity to clarify various points raised at my second day of confirmation hearings. My written responses to the additional written questions submitted to me on November 12, 1987 will be forwarded under separate cover.

EXHIBITS DUPLICATED ELSEWHERE IN THIS VOLUME HAVE BEEN OMITTED

LIST OF EXHIBITS TO ACCOMPANY ADDITIONAL SUBMISSIONS TO THE RECORD BY SUSAN W. LIEBELER

1. Letter from Prof. John McDermott re Jameson article.

2. Letter from Nolan Clark, Esq. re Jameson article.

3. Letter from Vice-Chairman Anne Brunsdale re CITBA interview.

4. Testimony of Clarence Kipps, Esq. Federal Circuit Bar Ass'n.

5. Letter of Richard O. Cunningham, Esq. re CITBA Report.

6. Letters and Statements from the trade community:

    (1) October 30, 1987 letter to Chairman Biden from Prof. William P. Alford, UCLA School of Law.

    (2) July 24, 1987 letter to Chairman Biden from Prof. Jonathan B. Baker, Amos Tuck School of Business Administration, Dartmouth College; formerly with Foley & Lardner.

    (3) July 29, 1987 letter to Chairman Biden from James N. Bierman, Esq. of Foley & Lardner, Washington, D.C.

    (4) November 9, 1987 letter and written statement to Chairman Biden from Richard Cunningham, Esq. of Steptoe & Johnson, Washington, D.C.; member of the Standing Committee on Customs Law and Vice Chairman of the Committee on Customs Law, Administrative Law Section, American Bar Association; Past Chairman, Committee on International Litigation and Current Chairman, Committee on Legislation, American Bar Association.

    (5) July 31, 1987 letter to Chairman Biden from Pierre F. de Ravel D'Esclapon, Esq., Donovan Leisure Newton & Irvine, New York.

    (6) November 3, 1987 testimony of the Federal Circuit Bar Association before the Senate Judiciary Committee.

    (7) November 3, 1987 testimony of John Greenwald, Esq., Wilmer, Cutler & Pickering.

    (8) November 3, 1987 testimony of ITC Trial Lawyers Association.

(9) October 28, 1987 letter to Chairman Biden from Prof. Fred S. McChesney, University of Chicago Law School; formerly with Steptoe & Johnson, Washington, D.C.

(10) October 29, 1987 letter to Chairman Biden from Prof. John T. McDermott, Loyola Law School.

(11) August 4, 1987 letter to Chairman Biden from Tom M. Schaumberg, Esq., Howrey & Simon, Washington, D.C.

(12) August 3, 1987 letter to Chairman Biden from Congressman Dick Schulze, member of the House Subcommittee on Trade of the Committee on Ways and Means which oversees the International Trade Commission.

(13) August 11, 1987 letter to Chairman Biden from Prof. Alan O. Sykes, University of Chicago Law School; formerly with Arnold & Porter, Washington, D.C.

(14) November 4, 1987 letter to Chairman Biden from Prof. Alan Swan, University of Miami Law School.

(15) October 28, 1987 letter to Chairman Biden from Prof. Diane P. Wood, University of Chicago Law School.

(16) August 7, 1986 letter to the Honorable Susan Liebeler from a group of individuals interested in trade policy.

7. Letters from Loyola Law School Faculty and Administrators:

(1) October 30, 1987 letter to Chairman Biden from Theodore A. Bruinsma, Esq., former Dean, Loyola Law School; President, University Technology Transfer, Inc.

(2) November 4, 1987 letter to Chairman Biden from Prof. Charlotte K. Goldberg, Loyola Law School.

(3) November 4, 1987 letter from Samuel H. Gruenbaum, Esq., Cox, Castle & Nicholson, Los Angeles; former Adjunct Professor, Loyola Law School.

(4) November 5, 1987 letter to Chairman Biden from Prof. Malvina Halberstam, Benjamin N. Cardozo School of Law, Yeshiva University; formerly Professor, Loyola Law School.

(5) November 2, 1987 letter to Chairman Biden from Prof. Michael Josephson, Loyola Law School; President, Josephson Institute for the Advancement of Ethics.

(6) November 5, 1987 letter from Prof. Gideon Kanner, Loyola Law School.

(7) November 5, 1987 letter to Chairman Biden from Roberta M. Klein, Esq., former Instructor, Loyola Law School.

(8) October 20, 1987 letter to Chairman Biden from Dean Travis H. D. Lewin, Syracuse Law School, formerly Visiting Professor, Loyola Law School.

(9) October 29, 1987 letter to Chairman Biden from Prof. John McDermott, Loyola Law School.

(10) November 4, 1987 letter to Chairman Biden from Martha S. Robinson, Esq., Professor Emeritus, Loyola Law School.

(11) November 6, 1987 letter to Chairman Biden from Prof. Dan S. Schecter, Loyola Law School.

(12) November 4, 1987 letter from Minda R. Schecter, Esq., Graham & James, Los Angeles; formerly Professor, Loyola Law School.

(13) November 9, 1987 letter to Chairman Biden from Lloyd Tevis, former Dean and Professor Emeritus, Loyola Law School.

(14) November 4, 1987 letter to Chairman Biden from Prof. Grace C. Tonner, Loyola Law School.

(15) October 30, 1987 letter to Chairman Biden from Prof. David C. Tunick, Loyola Law School.

(16) October 30, 1987 letter to Chairman Biden from Prof. Harry Zavos, Loyola Law School.

8. Letters from former Loyola Law School students:

    (1) November 4, 1987 letter to Chairman Biden from Jean M. Arnwine, Esq., O'Melveny & Myers, Los Angeles.

    (2) October 30, 1987 letter to Chairman Biden from Janet T. Davidson, Esq., Paul, Hastings, Janofsky & Walker, Los Angeles.

    (3) November 5, 1987 letter to Chairman Biden from D. Annette Fields, Esq., Debevoise & Plimpton, Washington, D.C.

    (4) November 4, 1987 letter from Samuel H. Gruenbaum, Esq., Cox, Castle & Nicholson, Los Angeles; former Adjunct Professor, Loyola Law School.

    (5) November 4, 1987 letter to Chairman Biden from Dean B. Herman, Esq., Ervin, Cohen & Jessup, Beverly Hills.

    (6) November 4, 1987 letter to Chairman Biden from Katherine A. Lind, Deputy County Counsel for the County of Riverside, California.

    (7) November 4, 1987 letter to Chairman Biden from Linda S. Masada, Fierstein & Sturman, Los Angeles.

    (8) November 5, 1987 letter to Chairman Biden from Adam Seigler, Esq., Jones Day Reavis & Pogue, Los Angeles.

    (9) November 3, 1987 letter to Chairman Biden from Julie Sulman, Esq., Rancho Palos Verdes, California.

    (10) November 4, 1987 letter from Gregory B. Thorpe, O'Melveny & Myers, Los Angeles.

9. Chairman Liebeler's opinion in Certain Optical Waveguide Fibers.

10. Chairman Liebeler's opinion in Certain Unitary Electromagnetic Flowmeters with Sealed Coils.

11. Statement of Prof. Warren Schwartz, Georgetown Law Center.

12. Letter from John Rocray, Esq. re Vermont arrest.

13. List of cases where Chairman Liebeler Found Imports Causing Harm to American Industry.

14. Section of DRAMs opinion re injury.

15. Letter to Senator Leahy from Herbert C. Wamsley, Executive Director, Intellectual Property Owners, Inc.

Exh. 1

LOYOLA LAW SCHOOL

October 30, 1987

Editor-in-Chief
Law and Policy in International Business
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001

Re: Jameson, Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique 18-517

Dear Sir/Madam:

The second half of the twentieth century has produced a number of new or at least expanded doctrines not the least important of which is the concept of full disclosure. We run into this concept when we buy groceries, when we borrow money and when we consent to a surgical procedure, just to name a few circumstances where we have come to expect "full disclosure." Lawyers have a special duty to disclose actual or potential conflicts of interest in a vast array of situations. Many of us have been troubled by the publication of law review articles where the author fails to disclose his/her "special interest" in the topic, especially when the author's goal is to discredit a legal principal or a legal institution.

The article referred to above seems to have had, as a major purpose, the discrediting of the US. International Trade Commission and in particular two of its present members, Chairman Susan Liebeler and Vice Chairman Anne Brunsdale. I do not question Mr. Jameson's right to challenge the opinions or views of either the institution or its members nor do I challenge your right to publish such an article. What bothers me is the failure to disclose Mr. Jameson's involvement as counsel for some of the litigants in the cases included in his article. (A list of some of his clients is attached. A number of them are in steel or steel fabricating industries which have for years been seeking relief from lower priced imports.) The article does not even reveal that Mr. Jameson was involved in one of the Court of International Trade decisions which he discusses at some length at pages 528-529. I would have thought that to maintain the integrity of your journal, you would insist that authors disclose such involvement; if they are unwilling to do so, a quick check with LEXIS or WESTLAW would produce the necessary information.

In the same vein, you should know that I am former colleague and friend of Commissioner Liebeler. While one can certainly disagree with her interpretation and application of the law, a critic should reveal his or her personal stake, in this case as counsel for many of the petitioners or intervenors, in the decisions being criticized.

Very truly yours,

John T. McDermott
Professor of Law

JTM/emt
Attachment:
cc: Susan Liebeler
Paul W. Jameson

Parties involved in recent trade litigation represented by Mr. Jameson

ARMCO INC. Bethlehem Steel Corp. Florida Wire & Cable Co. Shinko Wire America, Inc.	CAFC 760 F.2d 249 (1985
Bethlehem Steel Corp.	CAFC 742 F.2d 1405 (1984)
Roses Incorp.	CAFC 706 F.2d 1563 (1983) CIT 604 F.Supp. 1238 (1985) CIT 538 F.Supp. 418 (1982)
The Committee on Pipe & Tube Imports	CIT - F.Supp ___ (198)
Sawhill Tubular Division, Cyclops Corp. Atcor Inc. Wheatland Tube Corp.	CIT 666 F.Supp. 1550 (1987) CIT 658 F.Supp. 295 (1987)
American Spring Wire Corp. ARMCO Inc. Bethlehem Steel Corp. Florida Wire & Cable Co. Shinko Wire America, Inc.	CIT 590 F.Supp. 1273 (1984)
Bethlehem Steel Corp.	CIT 590 F.Supp. 1273 (1984)
PPG Industries	CIT 525 F.Supp. 883 (1981)
Haarman & Reimer Corp.	CIT 509 F.Supp. 1276 (1981)

Exh. 2

6905 Gillings Road
Springfield, VA 22152
November 2, 1987

Editor in Chief
Law & Policy in International Business
Georgetown Law Center
600 New Jersey Ave., NW
Washington, DC 20001

Dear Editor:

I read Paul W. Jameson's recent article entitled "Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique," appearing in 18 Law and Policy In International Business 517 (1986). To my sorrow, I found that the overblown rhetoric of the article was, on its face, supported by flawed scholarship.

A major thesis of the article is that two Commissioners are defying the law in the methods which they use to decide cases. The author either does not understand or deliberately overlooks the contrary evidence presented in his own paper. In each example, the author himself presents evidence, in footnotes or other parts of the article, that the proper method is still a matter of debate and open to interpretation under the law. Although these issues may be settled in Mr. Jameson's mind, he does scholarly discourse a disservice by presenting his opinion as the only legitimate point of view.

For example, one of the more egregious examples of poor scholarship and lack of disclosure involves the case of Hyundai Pipe Co. v. United States, decided by the Court of International Trade on February 23, 1987 (No. 84-6-00763). On pages 562 to 573, Mr. Jameson engages in an extended critique of the use of dumping margin analysis in determining whether dumped imports caused material injury to a domestic industry in ITC cases. Mr. Jameson is particularly critical about the use of dumping margin analysis by some Commissioners, and argues that the statute does not permit Commissioners to consider the size of the dumping or subsidy margin. He relegates to a footnote his awareness of controlling judicial precedent that the Commissioners can properly use this analysis. In Hyundai, the Court directly addressed this issue and stated that "the Commission is not barred from examining margins in carrying out its duties under the 1979 Trade Act." slip op. at 8.

Mr. Jameson, in discussing ITC Chairman Susan Liebeler's use of a five-factor causation test, states on page 552 that "[n]ot one of these five criteria is within the letter or the spirit of the law." But as to one of the five factors, "declining prices," the statute explicitly states that the Commission shall in determining "material injury" in dumping/countervailing duty cases consider "the effect of imports of that merchandise on prices in the United States for like products." 19 U.S.C. §1677 (7)(B)(ii). The author is presumably aware of this language since that section is cited on page 567. Another of the five factors, consideration of the size of the dumping margin, is permissable according to the Hyundai case discussed above. More broadly, the statute states that the Commission, in reaching determinations regarding "material injury," is permitted to consider "other factors" (19 U.S.C. §1677 (ii)(B)), and, as Mr. Jameson is aware, the relevant legislative history notes that "[i]n examining the impact of imports on a U.S. industry" the ITC is to "consider all relevant economic factors which have a bearing on the state of that industry." S.Rep. No. 249, 96th Cong., 1st Sess. at 87. Mr. Jameson cites the identical passage on page 525. Certainly it would seem that issues such as "declining prices" and "margins of dumping" and, indeed, all five factors can properly be viewed as "relevant economic factors."

Mr. Jameson castigates (on pages 524 to 530) various members of the Commission for using bifurcated injury analysis. But the most recent Court of International Trade case dealing with the subject, affirmed by the U.S. Court of Appeals for the Federal Circuit, directly supports the use of such an approach -- as the author states on page 528! See American Spring Wire Corp. v. United States, 590 F.Supp. 1273 (Ct. Int'l Trade 1984), aff'd sub. nom. Armco, Inv. v. United States, 760 F.2d (Fed. Cir. 1985).

Yet another example (page 539) is that the author singles out one Commissioner for failing to cross-cumulate while the Court of International Trade's 1986 decision in Bingham & Taylor v. UnitedStates, 667 F.Supp. 793 (Ct. Int'l Trade 1986) was being appealed. He failed to point out that this was the position taken by three members of the Commission, although it is implicitly recognized in his statement about "Commissioners who refused to cross-cumulate" (emphasis supplied).

Vigorous debate is an essential part of scholarly journals and Mr. Jameson's views should be heard. But scholarly debate is not advanced by poor scholarship used to put forth a political or personal agenda. When the analytical flaws can be discerned from the text of a proposed article, that article should be better edited and rewritten before it is published in a journal that purports to be scholarly. Thank you for your consideration.

Sincerely yours,

Nolan E. Clark

Nolan E. Clark

P.S. For sake of full disclosure, I wish to inform you that I am currently Director of the Office of Policy Development at the Federal Trade Commission. Previously, I have served in other positions at the FTC, including Deputy Director for Planning in the Bureau of Competition. In that position I reviewed, edited and participated in the preparation of filings before the International Trade Commission. These filings dealt with some of the issues discussed in Mr. Jameson's article. Although I am employed by the FTC and have dealt with these issues as an FTC employee, the comments in this letter are my own and do not necessarily reflect the views of the Federal Trade Commission, or any of its Commissioners.

cc: Susan Liebeler, Chairman, ITC
Anne Brunsdale, Vice-Chairman, ITC

Exh. 3

VICE CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

November 10, 1987

The Honorable Joseph R. Biden
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Several months ago two members of the Senate Judiciary Committee staff interviewed me personally and rather extensively regarding Susan Liebeler's nomination to the United States Court of Appeals for the Federal Circuit. As a continuing member of the International Trade Commission, I have hesitated to make public statements on Chairman Liebeler's nomination, even though I enthusiastically support it. And I am not writing now to repeat the strongly favorable comments I made in my long interview with your staff, since I assume that those comments have been ably communicated by your staff to the full Committee. Rather, I am writing to place in its proper context certain testimony which I heard when I attended the Judiciary Committee hearing on Chairman Liebeler's nomination last week.

At the November 3 hearing, I heard representatives of the Customs and International Trade Bar Association (CITBA) testify about work they did in preparing a report on Chairman Liebeler's nomination. There was extended dialogue between Senator Leahy and various bar association witnesses about whether their associations' views were based on "interviews." The CITBA witnesses testified that their report was based on a number of "interviews" of persons who had worked with Ms. Liebeler. I do not know how extensive CITBA's "interviews" of other persons might have been, but I do know that my "interview" consisted only of a brief telephone conversation lasting roughly five minutes with one of CITBA's representatives. I was asked very few questions. I was not asked to respond to criticisms that might have been leveled at Susan Liebeler, and I was not asked to comment in any detail on my working relationship with her.

Very truly yours,

Anne E Brunsdale

Anne E. Brunsdale
Vice Chairman
U.S. International Trade
Commission

cc: The Honorable
Strom Thurmond
Susan W. Liebeler

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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Exh. 6

SCHOOL OF LAW
405 HILGARD AVENUE
LOS ANGELES, CALIFORNIA 90024-1476

October 30, 1987

VIA AIRBORNE EXPRESS

The Honorable Joseph Biden
The United States Senate
Russell Building, SR-489
Washington, DC 20510

Dear Senator Biden:

I am writing to express my support for the nomination of Susan Liebler for a position on the United States Court of Appeals for the Federal Circuit.

I am a Professor of Law at Ms. Liebler's alma mater (at which her husband now teaches) but my support for her nomination is not a product of personal considerations. Indeed, I have never met Ms. Liebler. Rather, my support for Ms. Liebler's nomination is a product of my work as an academic whose specialities include international trade and intellectual property and as a former Washington practitioner (at Fried, Frank, Harris, Shriver & Jacobson) who appeared before the International Trade Commission often prior to the time that Ms. Liebler joined that body.

Based upon the foregoing experience, I believe that Ms. Liebler is well qualified for the Federal Circuit judgeship for which she is being considered. Although I have no doubt whatsoever that Ms. Liebler and I do not see eye to eye on many political issues of our day, I believe that she has discharged her responsibilities on the ITC with exceptional skill and integrity. In the face of considerable pressure from across the political spectrum, she has resisted the temptation to search for expedient solutions and instead has steadfastly sought to apply our trade laws as she, in her best professional judgment, believes them to be written. As a specialist in International Trade and Intellectual Property, I think that Ms. Liebler will perform admirably on the Court of Appeals for the Federal Circuit, the docket of which will continue to be filled with highly technical and politically charged cases from these fields. As a legal academic and a former practitioner, I think that

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courage of the type Ms. Liebler has repeatedly demonstrated while on the ITC deserves to be rewarded and encouraged if our judiciary and those charged with similar administrative responsibilities are to act, as we would all hope, from positions of principle.

I enclose for your information a copy of my curriculum vitae, setting out in detail my qualifications. Please feel free to contact me should you have any questions about this letter.

Thank you for your consideration.

Sincerely yours,

William P. Alford
Professor of Law

WPA:ml

Enclosures

WILLIAM P. ALFORD

ADDRESS

Office:
UCLA School of Law
Los Angeles, CA 90024-1476
(213) 825-7939 or 825-4841

Home:
938 Fifth Street #2
Santa Monica, CA 90403
(213) 395-7214

BIRTHDATE May 29, 1948

EMPLOYMENT

UNIVERSITY OF CALIFORNIA, LOS ANGELES, Professor of Law, from 1986; Acting Professor of Law, 1982-1986. Teaching principally in the areas of Chinese law and legal history, comparative law, international economic law, and the law of international business transactions.

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN, Washington, D.C. Associate, 1977-82. Specialized in general corporate and international business law.

GEORGETOWN UNIVERSITY. Adjunct Professor of Law, 1980-82.

CLEARY, GOTTLIEB, STEEN & HAMILTON, New York, N.Y. Summer Associate, 1976.

YALE UNIVERSITY. Teaching and research assistant in Chinese history; coordinator and *rapporteur* for Yale Faculty Seminar Series, 1973-75 (part-time).

BOSTON *GLOBE* NEWSPAPER. Reporter and British correspondent, 1969-72 (part-time).

TIME MAGAZINE. Correspondent, 1969-70 (part-time).

PROFESSOR HENRY STEELE COMMAGER, Amherst, Mass. Personal secretary and research assistant, 1969-70 (part-time).

GRADUATE EDUCATION

HARVARD LAW SCHOOL, 1975-77 (entered as a second year student, having received advanced standing for English legal studies). J.D., 1977.
Honors: Comment and Note Editor, *Harvard International Law Journal*; Harvard East Asian Legal Studies Program Grant. American Historical Association Prize Fellowship.

YALE UNIVERSITY, 1972-75. M.A. in Chinese Studies, 1974; M.A. in Chinese History, 1975.
Honors: American Historical Association Prize Fellowship; National Defense Foreign Language Fellowship; Yale University Fellowship; Yale East Asian Council Award; Yale Summer Language Institute Fellowship; Committee on United States-China Relations Travel Award.

ST. JOHN'S COLLEGE, THE UNIVERSITY OF CAMBRIDGE, 1970-72. LL.B., 1972.
Honors: Strathcona Exhibition; Honors Graduate.

UNDERGRADUATE EDUCATION

AMHERST COLLEGE, 1966-70. B.A. in American Studies, 1970.
Honors: *Magna cum laude* graduate; Newspaper Fund Fellowship; Amherst Memorial Prize Fellowship; John Woodruff Simpson Fellowship for Graduate Study (at the University of Cambridge); Secretary-Treasurer, Sphinx (college honor society).

[illegible]

PROFESSIONAL HONORS AND AWARDS

O'Melveny & Myers Centennial Grant (providing a sabbatical during the 1986-87 academic year), 1986.

Selected by International Advisory Board (established by the World Bank) to advise the Chinese with respect to University Development Project, 1986-.

Kluwer/International Lawyer's Newsletter China Prize (for fostering relations with the PRC in the area of law), 1985 (for 1984).

University of California Systemwide Career Development Award, 1984.

Elected to Honorary Membership in Phi Delta Phi National Legal Fraternity, 1982.

REPRESENTATIVE PUBLICATIONS

"When is China Really Paraguay: An Examination of the Approach of the Antidumping and Contervailing Duty Laws of the United States to Nonmarket Economy Nations," 61 Southern California Law Review 79 (1987).

A Report on the Southwest China Institute of Political Science and Law. (Report written for International Advisory Panel in conjunction with the World Bank's University Development Project -- 1986).

"On the Limits of 'Grand Theory' in Comparative Law," 61 Washington Law Review 975 (1986).

"The Inscrutable Occidental: Implications of Roberto Unger's Uses and Abuses of the Chinese Past," 64 Texas Law Review 915 (1986).

"Foreword," 4 Pacific Basin Law Journal 1 (1986).

"Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Imperial China" 72 California Law Review 1180 (1984).

"Zhu Qiwu and the Development of Criminal Law in the People's Republic of China" (Introduction to article by Prof. Zhu Qiwu), 2 Pacific Basin Law Journal 60 (1984).

A Report on the Schools of Law of Beijing University, Jilin University, People's University, Wuhan University, the Beijing School of Law and Politics, and the East China School of Law and Politics. (Report co-authored with Prof. R. Randle Edwards of Columbia Law School for the Ford Foundation -- 1982).

"Robert Van Gulik and the Judge Dee Mysteries," 12 Orientations 50 (November 1981).

"The Prospective Withdrawal of the U.S. from the International Labor Organization: Rationales and Implications," 17 Harvard International Law Journal 623 (1976).

Author of pieces on international trade and Chinese law for National Law Journal, Wall Street Journal, East Asian Executive Reports, American Bar Association National Institute (American Bar Association continuing legal education program), and other publications and programs.

WORK IN PROGRESS

The Chinese Legal Tradition (a collection of materials on Chinese law and legal history)

The Changing International Legal Order: A Chinese Perspective (a collection of materials on China and international law).

WORK IN PROGRESS (cont.)

"Whose Idea Is It Anyway? A Study of the Development of Intellectual Property Law in East Asia" (major research project still at an early stage; to be pursued further during 1986-87 academic year sabbatical).

A study of China's proposed resumption of membership in the General Agreement on Tariffs and Trade.

An examination of the communication of ideas about law between China and the U.S. focusing on Chinese students who have come to this country to study law (major research project at an early stage).

PAPERS AND OTHER ACADEMIC PRESENTATIONS

American Association of Law Schools Annual Meeting, New Orleans, January 1986 (organized [with Prof. W. Gray], chaired and served as discussant on panel on Chinese contract for Comparative Law Section).

Symposium on Alternative Dispute Resolution, Center for Public Resources and UCLA School of Law, Los Angeles, November 1985 (organized and chaired panel on alternative dispute resolution in China and Japan).

Emerging Issues Conference: The Pacific Basin, the University of California and the State Legislative Leaders Foundation, Berkeley, California, October 1985 (organized [with Prof. D. Dollar] and delivered paper on trans-Pacific textile trade and protectionism).

American Association for the Comparative Study of Law Annual Meeting, Seattle, September 1985 (delivered paper on the question of comparability in the study of Chinese law).

UCLA World Affairs Conference, Los Angeles, April 1985 (organized panel and delivered paper on trans-Pacific textile trade).

Sino-American-Canadian Conference on Legal Issues of Trade and Investment, Wuhan, China, January 1985 (served as vice-chair on U.S. side and delivered paper on the application of U.S. trade laws to China).

Conference on Legal Education Exchange with China, Columbia University School of Law, New York, February 1983 (spoke on Chinese legal education).

In addition to the foregoing, I have lectured at Harvard, Yale, Duke, Emory, USC, American University, the University of Connecticut, Beijing University, Zhongshan University (Canton), the China University of Political Science and Law (Beijing), The Southwest China Institute of Political Science & Law, and before governmental, professional, and business groups on legal, trade, and sinological topics.

EDITORSHIPS, PROFESSIONAL COMMITTEES AND OTHER RELEVANT PROFESSIONAL ACTIVITY

Executive Director and Faculty Member, The China Center for American Law Study, Beijing, PRC, 1987 (A month-long introduction to U.S. law for 60 young Chinese law faculty and lawyers sponsored jointly by the U.S. and Chinese governments and various private sources and taught by faculty from Columbia, Yale, Stanford, UCLA and other schools). Faculty member, 1986 session.

Member, UCLA Chancellor's Strategic Planning Committee, from 1987.

Editor, Law and Economy (Hong Kong) from 1987.

Executive Committee, Comparative Law Section, Association of American Law Schools, 1986.

EDITORSHIPS, PROFESSIONAL COMMITTEES AND OTHER RELEVANT PROFESSIONAL ACTIVITY (cont.)

Publications Advisory Board, International Law Institute, Washington, D.C., 1985 to present.

Board of Advisors, Asia Pacific American Legal Center of Southern California, Los Angeles, 1985 to present.

Executive Committee, UCLA Center for Pacific Rim Studies, 1985 to present.

Member, Provost's special committee to study the future of Asian Studies at UCLA, 1985 to present.

Member, United States Committee on Legal Education Exchange with China, 1983 to present.

Editorial Board, American Journal of Comparative Law, 1984 to present.

Faculty Advisor, UCLA Pacific Basin Law Journal, 1982 to present.

Editorial Board, China Law Reporter, 1982 to present.

China & Inner Asia Representative, Committee on Asian Law, Association for Asian Studies, 1982 to present.

Reviewer of applications for advanced study in China, Committee for Scholarly Communication with the PRC, 1982 to present.

Participant in and rapporteur for Sino-American Conference on Selected Legal Questions, co-sponsored by the Ford Foundation and the Chinese Academy of Social Sciences, Beijing, PRC, June 1982.

CONSULTANCIES

I consulted about Chinese affairs on an official or unofficial basis with the World Bank, the International Advisory Panel (established by the World Bank and the government of the People's Republic of China), the U.S. Departments of State, Commerce and Treasury, the Ford Foundation, People-to-People, the International Law Institute (Washington, D.C.), Amnesty International, Asia Watch, former President Jimmy Carter, Governor Michael Dukakis of Massachusetts, former Governor William Winter of Mississippi, Sargent Shriver and others.

REFERENCES

Sargent Shriver, Esq.; Fried, Frank, Harris, Shriver & Jacobson; 1001 Pennsylvania Avenue, N.W.; Washington, DC 20004

Ambassador Max M. Kampelman; U.S. Department of State; Room 7208 S-DEL; 2201 C Street, N.W.; Washington, DC 20520

Dean Susan Westerberg Prager; UCLA School of Law; 405 Hilgard Avenue; Los Angeles, CA 90024-1476

Jerome A. Cohen, Esq.; Paul, Weiss, Rifkind, Wharton & Garrison; 1285 Avenue of the Americas; New York, NY 10019

UNIVERSITY OF MIAMI
CORAL GABLES, FLORIDA 33124

SCHOOL OF LAW
P. O. BOX 248087

November 4, 1987

The Honorable Joseph A. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington D.C., 20510

Dear Senator Biden:

I write to urge, and strongly urge, that the Judiciary Committee recommend that the Senate consent to the appointment of Susan Liebeler to the Court of Appeals for the Federal Circuit. I understand that there is some opposition to the appointment. Since my specialty is international trade law and I have followed Ms. Liebeler's work on the International Trade Commission quite closely, much of the opposition, I suspect, represents the self-serving emanations of lawyers frustrated when their pleas on behaif of protection seeking clients have encountered Ms. Liebeler's broader sensitivity to the public interest. More on that point later. First, however, let me make full disclosure.

I am a life-long Democrat who, without apology, shares the convictions of the more liberal of that breed. I served from 1961-67 as Assistant General Counsel for Legislation in the Agency for International Development. I am currently Chairman of the International Law Section of the Association of American Law Schools, am the author of a text on International Economic Law to be published within the year by Matthew Bender & Co. and had enlisted in your campaign for the Presidency. I am a classmate and long-time friend of Susan Liebeler's husband, James Liebeler. Jim is an articulate and determined conservative out of the Chicago school of economics. I am a Chicago product who didn't succumb to that school. I assume Susan shares her husband's convictions. All of this, however, is quite beside the point, because political ideology is not the issue in the matter of Susan Liebeler's appointment, competence is.

For better than fifteen years -- actually going back to a seminar paper in Law School -- I have followed, with growing concern, the work of both the Tariff, now the International Trade, Commission and the Court of Customs and Patent Appeals, now the Federal Circuit. Again and again, the decisions coming out of both the Commission and the court bear all the hallmarks of poor craftsmanship. Far too often those decisions exhibit a wooden literalism, economic illiteracy and a woeful lack of imagination or common sense. The Federal Circuit is, by all counts, the weakest court in the Federal system. Yet, the trade and other questions with which that court and the International Trade Commission are charged bear too importantly on the national welfare for this state of affairs to continue.

On the Commission, Susan Liebeler has been a breath of fresh air. She quite plainly understands that, not unlike the framers of the Constitution, Congress in fashioning trade legislation must often write in very general terms, setting only the

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broad directions of policy and leaving it to the Commission and the courts to work through the implications of those policies for specific cases. That task cannot be done by a foolish and unimaginative literalism. It cannot be left to people incapable of understanding the economic forces at work in a case or the economic consequences at stake in their decision. Most importantly, it cannot be left to people who because of their economic illiteracy respond only in terms they conceive to be politically expedient, often relying more on Congressional rhetoric than on what Congress has actually legislated. Susan Liebeler's work shows clearly that she possesses the legal imagination and the common sense that is required for the task Congress has set, that she is not afraid of careful economic analysis, that she possesses the independence of mind necessary to abjure politically expedient decisions and yet fully understands her obligation to the broad policy framework established by Congress.

Needless to add, Susan Liebeler comes to her task with a strong free-trade orientation. It is not a little ironic that as a Republican this might be held against her. Historically, at least, free-trade has been as much a tenet of the Democratic as of the Republican Party. And under the leadership of both parties the commitment to free-trade, as much as any other factor, has been responsible for the steady rise in free-world prosperity since World War II.

More to the point, however, given her orientation and given this history, one could and should expect Ms. Liebeler -- and any other judge for that matter -- to view critically many of the protectionist interpretations of the law that are increasingly being urged upon the Commission and the Federal Circuit. The truth is that, for those competant to see it, there is more than a little ambivalence written between the lines of current legislation, an ambivalence reflective of both the increasing complexity and importance of the trade problem and of Congress's awareness that there no easy solutions. In this context, I believe it essential for those charged with applying the law, first to understand fully the economic implications of their decision and how those implications bear upon the interpretation of the law and then to remain faithful to the free-trade tradition until Congress, and Congress alone, determines how much of it is to be abandoned. It is not for the judges to assume that awesome task, whether they do so deliberately or unwittingly for lack of understanding. And it is precisely because of her free-trade orientation and her knowledge and understanding of the economic implications of the cases that Ms. Liebeler can be trusted to perform her proper role as a judge and to perform it with high competence.

Again, let me urge that the Judiciary Committee recommend that the Senate consent to the appointment of Susan Liebeler to be judge on the Federal Circuit.

Sincerely Yours,

/s/ Alan C. Swan

Alan C. Swan
Professor of Law

LOYOLA LAW SCHOOL

November 4, 1987

Honorable Joseph A. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirkson Senate Office Building
Washington, D.C. 20510

RE: Appointment of Susan Liebeler

Dear Senator Biden:

This letter is in support of the appointment of Susan Liebeler to the U.S. Court of Appeals for the Federal Circuit. I have known Professor Liebeler since I came to Loyola Law School in 1981.

As a new professor at a new school, Professor Liebeler was a great help to me. She made me feel comfortable here and gave me valuable advice and counsel. We have stayed in touch since she has left Loyola and I know I can turn to her for advice on how to handle difficult problems dealing with students. She is both wise and sensitive.

In terms of her stature as a professor, I know that she was creative and demanding. She added several course offerings to our curriculum that went beyond the more mundane legal topics. She demanded a great deal from her students and would not tolerate intellectual laziness. She may not have been popular with students who wished to coast through law school, but she offered a real challenge for many students.

It is clear that Susan Liebeler is a real thinker who will not opt for easy answers to hard questions. There is no question that she would approach every case with the diligence, intelligence, and honesty that marked her career as a law professor. I give her my whole-hearted and complete support.

Thank you for your consideration.

Sincerely yours,

Charlotte K. Goldberg
Charlotte K. Goldberg
Associate Professor of Law

cc: Honorable Strom Thurmond
United States Senate
139 Dirkson Senate Office Builiding
Washington, D.C. 20510

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MICHAEL D. MACKNESS
SUSAN J. JACKSON
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CHARLES E. HONEMAN
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BARRY R. JABLON
ROBERT D. INFELISE
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CAROL M. LIPLAND
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D. SCOTT TURNER
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STEVEN A. JUNG
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BARRY R. MEEPOS
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TAMAR C. STEIN

ORANGE COUNTY OFFICE
5000 BIRCH STREET, SUITE 300
NEWPORT BEACH, CALIFORNIA 92660
(714) 476-2111

OUR FILE NO

November 4, 1987

11-03-06

VIA FEDERAL EXPRESS

Honorable Joseph Biden, Chairman
Senate Committee on the Judiciary
224 Dirksen
Senate Office Building
Washington, D.C. 20510

Re: Nomination of Susan Liebeler for the United States Court of Appeals for the Federal Circuit

Honorable Chairman Biden:

I am sending this letter with regard to the nomination of Susan Liebeler to the United States Court of Appeals for the Federal Circuit.

I have known Ms. Liebeler for over ten years. During that time, I worked with her as a co-faculty member at Loyola Law School in Los Angeles, I guest lectured in various law school courses which she taught, I engaged in considerable analysis with her on significant legal issues, and, many years ago, I was her law school student for three law school courses (i.e., two Corporations courses and one Securities Regulations course).

Before elaborating on my views regarding Ms. Liebeler, let me briefly tell you about myself. I have a Juris Doctor degree from Loyola Law School in Los Angeles, which I received in 1977. I graduated in the top 15% of my class. In addition, thereafter I received a Masters of Law Degree from the Georgetown University Law Center. I am currently a partner in the Los Angeles law firm of Cox, Castle & Nicholson. We have 75 lawyers, and as a firm are heavily engaged in business and commercial law at all levels: i.e., international, national, and local. Our clientele ranges from the largest institutions in the world to local entrepreneurs. Our legal matters have spanned several countries, including many countries in Europe, Japan, Hong Kong, China, Israel, Australia, and Sudia Arabia.

I head our firm's corporate and securities practice. I have been a member of the Executive Committee of the Business and Corporations Law Section of the Los Angeles County Bar Association since 1982. I was a law professor at Loyola Law School in Los Angeles from approximately 1980 to 1985, where I taught Corporations Law, Securities Law, and Accounting for Lawyers. I was a contributing editor to Corporation Law Review for several years, and I have published over a dozen securities law articles in law reviews all over the United States. I am a frequent lecturer on securities and corporate subjects to professional and business organizations.

I know Ms. Liebeler extremely well. During two of my three years in law school, I had the privilege of taking three of her courses. In addition, in my third year of law school, I participated in the Securities and Exchange Commission's law school intern program because Ms. Liebeler took the time and energy, and made the personal commitment, to involve Loyola Law School in that program, and encouraged her students to participate in it. (Similarly, Ms. Liebeler was very active in the Law School's involvement with the California Department of Corporations' intern program.) During the time that Ms. Liebeler and I were on the Loyola faculty together, I had ample opportunity to work with her. I would say that I know Ms. Liebeler extremely well from many different perspectives.

It is my pleasure and privilege to recommend Ms. Liebeler highly for appointment to the United States Court of Appeals for the Federal Circuit. In this capacity, she would be a great asset to our judicial system, and would bring intelligence, objectivity, wisdom, compassion, and an enormous capacity for effectively and efficiently dealing with complicated issues to the cases before the Court.

1. Ms. Liebeler is a woman of the highest intelligence. From an academic perspective, she has the ability to grasp complex legal issues and deal with them in a creative and effective way. From an intellectual and philosophical perspective, she has a magnificent ability to comprehend thoroughly the theories underlying and the purposes behind the law. From a practical perspective, she has a superb talent in taking

complicated legal theories and principles and applying them to real world transactions and circumstances.

2. Ms. Liebeler has considerable skills as an effective teacher and communicator of concepts and ideas. She has shown this in the classroom, in scholarly publications she has written, and in working with her colleagues on the Law School faculty. In a field such as ours where precision and effective communication are the tools of our trade, Ms. Liebeler is a master tradeswoman.

3. As a general proposition, being a good law school professor is very difficult. It requires a tremendous personal commitment, an extremely strong understanding and grasp of the particular subject matter, great analytical skills, effective communication, and the ability to deal with situations and people objectively and compassionately. I must give Ms. Liebeler the highest ratings in all of these. I learned so much from her teachings and her approach, and I carry and use much of it to this day. From time to time when I see some of my law school classmates who shared the privilege with me of being Ms. Liebeler's student and we reminisce about Ms. Liebeler's classes, we all agree on how strong, knowledgeable and good a teacher she was. The other people of whom I speak took only one or two classes from Ms. Liebeler, whereas I took three, and they therefore have a better ability than me to compare her to other professors who taught the same subject matter. Uniformly they have told me that what they learned from Ms. Liebeler exceeded by considerable measure what they learned from other professors, and the knowledge that I demonstrated from the courses I took from Ms. Liebeler that they did not was far superior than the knowledge they had developed from other professors teaching the same courses.

4. I found Ms. Liebeler to be unstinting in her personal commitment as a law professor, as well as in her interest for the progress and well being of her students. I know, from having been her student and from having been a co-faculty member with her, that she invested enormous amounts of time and energy in mastering the legal areas which she has so capably taught, and in caring for and dealing with the hundreds of students who have had the benefit of being in her classes. In the years that I knew her as a student, she gave endlessly of herself in terms of time, energy and commitment to the classroom, and to her students outside of the classroom. There was not a time that she was unavailable to meet with students to discuss concepts or issues relating to the classroom, or matters of concern to particular students that may not have necessarily been classroom

matters. Her desire to help and concern for her students were commendable.

5. Many of the concepts and theories in the Corporations and Securities Law classes that Ms. Liebeler taught were new and difficult for a large number of the students who came into the classes without a business background. I can say from my own personal experience in teaching these courses that this presents an especially difficult and sometimes frustrating challenge to the professor. It requires a tremendous grasp of the English language, a very strong ability to effectively communicate, a talent for keeping control of and maintaining fluidity in a discussion among a large number of people, and a sense of appreciation and understanding for the lack of background and knowledge on the part of the students. Bringing all of these abilities to bear is a talent and a virtue, and Ms. Liebeler did so in an exemplary fashion in her classes.

6. Many of the issues in the business law area are not black and white issues; rather, they are difficult to deal with, require very strong analytical skills, and are demanding of an ability to objectively analyze and evaluate specific facts and circumstances. As in so many other areas, Ms. Liebeler has demonstrated outstanding skills in these areas, and a very solid ability to deal with them with the grace and agility of a master.

In summation, I wish only that you and your Committee members had the extensive first-hand experience that I have had with Ms. Liebeler to see the truth and importance of what I have said about Ms. Liebeler. I firmly believe that she would be a great asset to the judiciary and our country as a judge for the United States Court of Appeals for the Federal Circuit, and I wholeheartedly and enthusiastically support her appointment.

Should you have any questions or require any further information, please feel free to contact me.

Yours sincerely,

Samuel H. Gruenbaum

SHG:rd
Enclosures

BENJAMIN N. CARDOZO SCHOOL OF LAW
YESHIVA UNIVERSITY
55 FIFTH AVENUE, NEW YORK, NY 10003-4391

November 5, 1987

Hon. Joseph A. Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I understand that the Senate Judiciary Committee is considering the nomination of Susan Liebeler for the United States Court of Appeals for the Federal Circuit. I write to support her confirmation.

Susan and I served together on the Loyola Law School faculty. She is a very bright, thoughtful and hardworking person, with a strong sense of justice, and was highly respected by students and faculty. As a teacher, she had a reputation for being challenging and demanding. As colleagues, we discussed many issues and her comments were always thoughtful and stimulating. Although she held strong views on some issues -- as people of her intellectual calibre often do -- she was always willing to analyze and discuss her positions.

I think her probing analytical mind, strong sense of justice, and devotion to hard work, will make her an excellent judge and urge her confirmation.

Sincerely yours,

Malvina Halberstam
Professor of Law

JOSEPHSON INSTITUTE for the Advancement of Ethics

President
[illegible]
Executive Director
[illegible]
Eastern Regional Director
[illegible]
Board of Governors
[illegible], Associate Justice, Supreme Judicial Court, Mass.
[illegible], Office of President, Univ. of Chicago
[illegible], Professor, [illegible] School; Editor, Journal of Legal Education
[illegible], Professor, [illegible], Univ. of California at Berkeley
[illegible], Professor, [illegible], Wayne State Univ.
[illegible]
[illegible], Vice President, General Counsel, General Motors
[illegible], Chief Diplomatic Correspondent, NBC News
[illegible], Chairman
[illegible]

COPY

November 2, 1987

Honorable Senator Joseph Biden
Chairman, Senate Committee on the Judiciary
Room 224
Dirksen Office Building
Washington D.C., 20510

Dear Senator Biden:

I know that your Committee is considering the nomination of Susan Liebeler to the United states Court of Appeals, Federal Circuit. Since she and I were colleagues on the Loyola Law School faculty for many years (I am presently on a one year leave so that I may devote full time to the work of the Institute), I have some strong and, I assure you, well considered beliefs that I think could help your deliberations.

In my opinion Ms. Liebeler would make an excellent judge. Though she and I differed often and vigorously on substantive issues, I always had great respect for her intellect and her willingness to listen to and consider other points of view. While she has firm opinions and a definite point of view, so do all my colleagues on the faculty. She most certainly is not a narrow ideologue. To the contrary, she was always thoughtful and fair in considering opposing arguments. In the course of our many debates, I came to cherish the times I could get her to change her opinion and I grudgingly ackowledge that, just as often, she persuaded me to modify my views.

Susan is no pushover but she is open and intellectually honest. She is rigorous and demanding in her reasoning but I never knew her to be rude or inconsiderate. There are those on our faculty who resented her comparatively conservative point of view and her willingness to challenge basic assumptions, but they, not her, tended to be narrow minded.

She was always well informed, thorough and conscientious. While most law professors treat their committee work with disdain, Ms. Liebeler accepted her responsibilities completely and went well beyond the call of duty, frequently preparing extensive memos and reports. When she conducted reference investigations for faculty applicants, her reports were consistently the most helpful and they were always scrupulously fair and objective.

In my opinion, she is too good a candidate to lose. I urge you to take positive action on her nomination.

Very truly yours,

Michael Josephson

Michael Josephson

LOYOLA LAW SCHOOL

Professor Gideon Kanner
(213) 736-1058

November 5, 1987

The Honorable Joseph A. Biden, Jr.
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of **Susan Liebeler** to U.S. Court of Appeals

Dear Senator Biden:

It has come to my attention that derogatory remarks have been made about Ms. Liebeler supposedly on the basis of her tenure here at Loyola Law School. This is to respond.

I first note that that no person making such allegations has been in contact with me. I find this remarkable since I am one of the more senior faculty members and I worked with Ms. Liebeler from 1974 until her departure for Washington.

Throughout the time we worked together, I found Ms. Liebeler to be bright, articulate, outspoken and toughminded. I would not be at all surprised if the unfavorable remarks about her turned out to originate with people whom she bested in an exchange of ideas. It also seems clear to me that if Ms. Liebeler were a man, no one would try to detract from her ability to express herself in a forceful and effective way when circumstances require it.

In sum, I am not aware of anything about Ms. Liebeler that would reflect adversely on her ability to serve as a federal appellate judge. I hope that she will receive your favorable consideration.

Sincerely yours,

Gideon Kanner

Gideon Kanner
Professor of Law

cc: The Honorable Strom Thurmond

Roberta M. Klein
4322 Howard Avenue
Los Alamitos, California 90720
(213) 596-8067

November 5, 1987

By Hand Delivery

Hon. Joseph Biden, Jr.
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Susan W. Liebeler

Dear Mr. Chairman:

I am writing to urge your support of the confirmation of Susan W. Liebeler to the United States Court of Appeals for the Federal Circuit. Chairman Liebeler's intellectual honesty and ability to work well with people will make her an outstanding addition to the federal bench.

I have known Chairman Liebeler since 1978, when we were colleagues on the faculty of Loyola Law School in Los Angeles. Our views on many subjects, legal and political, differed markedly. Nonetheless, then-Professor Liebeler always welcomed a full airing and consideration of opposing views and retained an open and fair mind as to the outcome of our discussions. I believe that she will bring that same intellectual curiosity and fairness to the federal bench.

Several students who had completed the first year legal writing and research course that I taught thereafter served as research assistants for Professor Liebeler and found that experience to be rewarding. They reported that they were given intellectually stimulating projects and that Professor Liebeler treated their views with respect in discussions concerning those projects. They invariably appreciated the interest that Professor Liebeler took in their academic and professional careers and the guidance she offered them.

Former students of mine who enrolled in Professor Liebeler's courses reported equally positive experiences. They respected the rigorous preparation that Professor Liebeler demanded of herself no less than of her students, and they appreciated the resulting quality of discussion that was routine in her classroom.

Professor Liebeler developed and administered a highly successful judicial clerkship placement program at Loyola. In that capacity, she spent a substantial amount of time with each interested student assessing his or her interests, strengths and weaknesses in order to identify appropriate clerkships. She spent an equal amount of time with members of the faculty to secure letters of recommendation that would describe an applicant's qualifications in a manner much more informative than a paper record.

In addition to involvement in the judicial clerkship placement program as a faculty member at Loyola, I have reason to appreciate Professor Liebeler's efforts from two additional perspectives. First, Professor Liebeler was instrumental in helping me secure my clerkship to Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit. When she learned of Judge Reinhardt's confirmation, she urged me to apply. My confidence in her judgment caused me to do so and to interrupt my post-graduate studies at Columbia Law School in order to accept that clerkship, a decision I have never regretted. Second, during my two-year tenure as a clerk, Professor Liebeler referred a number of superbly qualified externs and clerkship candidates to Judge Reinhardt's chambers. Her judgment and perception were of great assistance.

Chairman Liebeler's demonstrated ability to work well with faculty and students, her fairness and her constant willingness to listen and consider before forming a judgment will serve her well on the federal bench. In brief, Chairman Liebeler possesses an excellent judicial temperament that will make her a great asset to the United States Court of Appeals for the Federal Circuit. I urge you to recommend that she be confirmed.

Very truly yours,

Roberta M. Klein

Roberta M. Klein

cc: Chairman Susan W. Liebeler

LOYOLA LAW SCHOOL

4 November 1987

The Honorable Joseph Biden
Chairman, Senate Judiciary Committee
The United States Senate
224 Dirkson Senate Office Building
Washington, D. C. 20510

Dear Senator Biden:

I urge you and your Committee to accept the nomination of Susan W. Liebeler as Judge of the United States Court of Appeals for the Federal Circuit and to vote for her confirmation.

Mrs. Liebeler was my colleague on the faculty of Loyola Law School for many years. Indeed I was one of the faculty members who first recommended her for a teaching position and later recommended her for tenure. I have worked closely with her in the various faculty activities of the school. In my opinion she has a quick and penetrating intelligence, is analytical, and is well read in her fields of legal expertise. Perhaps equally important is the highly intuitive quality of her mind and her warmly collegial nature.

From my long association with her I have no doubt that Mrs. Liebeler will be a respected and conscientious judge with a deserved reputation for well considered judicial conduct.

Sincerely yours,

Martha S. Robinson

Martha S. Robinson
Professor of Law Emeritus

cc: The Honorable Strom Thurmond

LOYOLA LAW SCHOOL

November 6, 1987

Honorable Joseph Biden
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: A Statement In Support of the Appointment of Susan Liebeler to the United States Court of Appeals for the Federal Circuit

Dear Senator Biden:

It is an honor and a pleasure to submit this letter in support of Susan Liebeler's appointment to the Federal Circuit. During the early 1980's, Ms. Liebeler and I were on the faculty of Loyola Law School in Los Angeles. She and I frequently discussed issues of legal doctrine, as well as questions relating to legal education. In both areas, she held clear, coherent, well-developed opinions. I was tremendously impressed by the depth and power of her intellect and by her willingness to consider opposing viewpoints.

The same traits carried over to Ms. Liebeler's classroom teaching. She challenged her students, inspiring them to work hard and to think carefully. Her lectures probed the limits of the law, rather than skimming the surfaces. I greatly admired her courage and her independence: rather than catering to the students' natural desire for easy answers, she took the harder road and demanded excellence of the class and of herself. During my own teaching career, I have tried to emulate Ms. Liebeler's dedication and integrity in the classroom.

Without doubt, Ms. Liebeler will bring that same brilliance and determination to the Federal Circuit. I therefore respectfully urge the Senate to confirm her appointment expeditiously.

Respectfully submitted,

Dan S. Schechter
Associate Professor of Law

DSS/eb

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CHALGRAY, LOS ANGELES, CA

November 4, 1987

The Hon. Joseph A. Biden, Jr.
Chairman, Senate Committee of the Judiciary
224 Dirkson Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing this letter in support of the proposed judicial appointment of Susan Liebeler for the United States Court of Appeals for the Federal Circuit. I served on the faculty of Loyola Law School with Ms. Liebeler for three years and had substantial contact with her, in part because we taught the same subject (corporations).

When I came to Loyola, Ms. Liebeler was the first and primary faculty member to introduce herself to me and offer any assistance she could give. Throughout my tenure at Loyola, she shared the benefit of her experience with the subject matter and with teaching methodology. Despite her superior knowledge and experience, she was very open-minded in discussing and often adopting my contrary or alternate views and approaches.

Ms. Liebeler made herself available to faculty members and to her students without hesitation or limitation. She singlehandedly took on many projects for the benefit of the school and its students, and worked well on faculty committees. She was truly a "team player," although, in fact, she was clearly the brightest, the most capable, and the most dedicated person on our faculty. She exceeded all other faculty members in the effort she devoted to school projects and to assist students in whom she believed. There are many Loyola graduates who think of her as their finest professor.

Ms. Liebeler's intellectual capabilities are extraordinary. She is a very hard worker and undertakes extensive well-balanced analyses of every issue to be sure she has considered all factors and reached a reasoned conclusion. In dealing with student issues, Ms. Liebeler demonstrated an exemplary sense of equity and fairness.

The Hon. Joseph A. Biden, Jr.
November 4, 1987
Page Two

It is clear to me and other members of the faculty and student body that Susan Liebeler has all the qualities and judicial temperament to be an outstanding Judge for the United States Court of Appeals for the Federal Circuit. I vigorously and wholeheartedly support her appointment and truly believe that a stronger and more capable candidate could not be found.

Very truly yours,

Minda R. Schechter

Minda R. Schechter

MS/db

LOYOLA LAW SCHOOL

November 9, 1987

Hon. Joseph Biden, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: SUSAN LIEBELER

Dear Senator Biden:

This letter is written to support the nomination of Susan Liebeler to be a Judge of the United States Court of Appeals for the Federal Circuit.

I believe that I can address the matter of her qualifications from the vantage point of long experience as a legal educator. I was a member of the Loyola Law School faculty from 1952 until my retirement in 1986. During this time I served as Assistant Dean, Associate Dean, and as Dean. I chaired many committees including the committe which evaluated the performance of members of the faculty for purposes of tenure.

I first became acquainted with Ms. Liebeler when she joined the faculty of Loyola Law School. Her first year was not an easy one in that she was pregnant and gave birth to a daughter. Despite this, she performed her duties without stint.

In committee and faculty meetings I observed her manner and listened carefully to what she had to say. It became clear that, in her, we had a person of superior intellect who was constantly encouraging her students and her colleagues to pursue excellence. If one were content to plod, this would naturally be somewhat irksome and some were irked. Perhaps a few men resented having around a woman of action and intelligence. But such people were few in number. Most of us found her a very valuable colleague and were very sorry when she accepted appointment to the International Trade Commission.

Hon Joseph Biden, Chairman
Senate Committee on the Judiciary
November 9, 1987
Page 2.

Professor Liebeler was very active in upgrading substantially our efforts to place students in judicial clerkships. As a result of her efforts many more of our students became law clerks, including one at the Supreme Court of the United States. She was not interested in countenancing mediocrity. Rather she sought to reward those whose efforts brought out their best. This, to me, is one of the marks of a dedicated teacher.

Professor Liebeler held many strong opinions about legal education and about the law. No one would ever accuse her of being "wishy-washy." She could be convincing in expressing her views. However, she also knew when to compromise or when to accept contrary opinions. In other words, she was not a destructive force, but she would force us to think carefully about what we were doing. This type of intellectual activity is essential to good appellate court decision-making. She would handle this role admirably.

I strongly believe that Susan Liebler is a superior nominee for appointment as an appellate judge. I respectfully urge confirmation of her appointment.

Respectfully,

Lloyd Tevis

LLoyd Tevis
Professor of Law Emeritus

cc: Hon. Strom Thurmond,
United States Senator

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TASHA D. LEVINSON
RICHARD C. MOORE
ABE MARK SHER
BARRY G. EDWARDS

HARVEY FIERSTEIN
(1923-1984)

November 4, 1987

VIA HAND DELIVERY

Honorable Joseph Biden
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Susan W. Liebeler: Nominee to the United States Court of Appeals, Federal Circuit

Dear Mr. Biden:

I am writing to you in support of Susan W. Liebeler and her nomination to the United States Court of Appeals for the Federal Circuit.

While attending Loyola Law School here in Los Angeles in 1978, I had Susan Liebeler as my teacher for a course in Corporations Law. I found Susan to be a bright, extremely capable educator who was thorough and challenging in her presentation of the subject matter, yet concerned about the level of comprehension of that subject matter by her students. Susan interacted well with her students, often eliciting discussions on issues important to an understanding of the law. She was receptive to questions from all students and very willing to listen to and to discuss positions which differed from her own.

Based on my experiences and observations in Susan's class, I feel that she is well suited to the position on the federal bench for which she has been nominated. I urge you to recommend that Susan Liebeler's nomination be confirmed.

Very truly yours,

Linda S. Masada

Linda S. Masada

LSM/clm

ADAM SIEGLER
355 SOUTH GRAND AVENUE
SUITE 3000
LOS ANGELES, CALIFORNIA 90071

5775-axs-1173j
069100-103-011

November 5, 1987

Honorable Joseph Biden
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Biden:

I am writing in support of the nomination of Susan W. Liebeler to the Federal Circuit Court of Appeals. I am a former student of Professor Liebeler at Loyola Law School, Class of 1984, and a former federal judicial clerk, I am presently a litigator with a major law firm, and I have read materials published by Ms. Liebeler in her capacities as Professor of Law and as Chairman of the International Trade Commission. Accordingly, I feel I am qualified to comment on her qualifications for the federal bench.

As a student in her classes on corporations and securities, I found Professor Liebeler to be knowledgeable, challenging and insightful. She displayed a strong combination of practical and academic qualifications; encouraged class participation, including presentations on various topics; always made herself available for consultations with students;

and generally encouraged students to analyze and explore beyond the minimum course requirements. In particular, Professor Liebeler's practice of fostering open discussion tempered with analytical thoroughness produced a learning environment that played a major role in my development as a law student.

In summary, I consider that Ms. Liebeler's unquestioned competence and intellectual and personal integrity make her an ideal candidate for the Federal Circuit Court of Appeals.

Very truly yours,

Adam Siegl

Adam Siegler

JULIE SULMAN
Attorney at Law
5205 Middlecrest Road
Rancho Palos Verdes, Ca 90274
(213) 541-3310

November 3, 1987

The Honorable Joseph Biden
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing in support of Susan Liebler's nomination to the United States Court of Appeals for the Federal Circuit. In 1982-83 when I was a third year student at Loyola of Los Angeles Law School I served as Professor Liebler's research assistant. In my dealings with her I have always found Professor Liebler to be accommodating, open and fair-minded, willing to listen and respectful of the opinions of others.

For example, the year I worked for her I was the Managing Editor of the Law Review and externed for the Los Angeles County District Attorney's Office where I am presently employed. Professor Liebler was always willing to accomodate her schedule to mine rather than requiring that I work a fixed number of hours per week for her. In addition, although our views on many political questions diverged, our differences served as a catalyst for stimulating and spirited (and sorely missed) intellectual discussions.

Professor Liebler was also extremely helpful to and supportive of me in obtaining a judicial clerkship following my graduation from law school. She not only wrote letters of recommendation but made many personal calls on my behalf. Fellow students and faculty had nothing but praise for Professor Liebler's dedication to teaching, her high standards and her intellectual prowess.

Professor Liebler is bright and fair, would have an excellent judicial demeanor and demand the best of litigants appearing before her. She would be an asset to the federal bench and I urge her confirmation.

Sincerely yours,

Julie Sulman

Julie Sulman

834 South Sherbourne Drive
Los Angeles, California 90035

November 4, 1987

The Honorable Joseph Biden
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re Ms. Susan Liebeler

Dear Senator Biden:

I write in support of the nomination of Susan Liebeler to a position on the Federal Circuit. I had the good fortune to have Ms. Liebeler as a professor while I attended Loyola Law School. Ms. Liebeler was an excellent teacher who presented all viewpoints to her students and challenged us to understand and consider all of those viewpoints in dealing with legal issues. The training I received from Ms. Liebeler has been a great benefit to me during my five years of law practice.

One of the most impressive things about Ms. Liebeler was the extraordinary efforts she made as an advisor to students on career planning questions. Although this task was not one of her jobs at the law school, Ms. Liebeler always made herself available to students who wished advice on law firms, governmental or public interest jobs or judicial clerkships.

While Ms. Liebeler and I have very different beliefs on a number of political and economic issues, I have tremendous respect for her intellect and integrity and I believe she will make an excellent judge who would decide cases on the merits and not on a preconceived ideological basis. I strongly recommend that Ms. Liebeler's nomination for a position on the Federal Circuit be confirmed.

Very truly yours,

Gregory B. Thorpe

cc: Senator Strom Thurmond
Ms. Susan Liebeler

Exh. 9

Views of Vice Chairman Liebeler

The issue in this case is whether importation by respondent Sumitomo of optical waveguide fibers found to infringe valid patents owned by complainant Corning tends to cause substantial injury to the domestic industry that exploits those patents. The ALJ found that such importation lacked such a tendency. The Commission granted review and affirmed the ALJ. I dissent, believing that the majority is incorrect both in interpreting the law and in applying it to the facts.

Patents are, and should be, among the most secure forms of intellectual property; provision for their protection is embodied in our Constitution.[1] Importation of a product which infringes a valid patent will *always* affect the patent holder adversely. In depriving the patent owner of royalties it reduces the value of the patent and the incentive to invest in developing and producing new products. More importantly, however, failing to prevent such importation reduces the incentive of others to innovate, develop, and produce new products.[2] The Commission should, therefore, employ its most lenient injury test in Section 337 patent cases.[3]

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[1] U.S. Const. Art. I. Sect. 8 provides, "The Congress shall have power...to promote the progress of science and the useful arts, by securing for limited times to authors and inventors, their exclusive right to their respective writings and discoveries."

There is no reason why the Commission's standards in Section 337 cases should differ significantly from those used by district courts in intellectual property cases. In that forum there is strict liability for patent infringement; infringement alone justifies an injunction. The economic rationale for providing protection of intellectual property rights is not dependent on whether infringement of those rights is of foreign or domestic origin. The construction of elaborate and strict injury tests is neither contemplated by the statute,[4] nor does it serve any public purpose.

Infringements of intellectual property rights present severe, at times intractable, problems for their owners. The rights are often difficult to define and defend. When a domestic party violates a patent, the owner can often obtain relief in a federal district court. A domestic infringer is subject to personal jurisdiction in a district court and can be enjoined from further illegal activity.

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[2] "'The pirating of these [products]...can only have an adverse effect on competition in the development and manufacture of [products].... There will be little incentive for...manufacturers to devote the months or years necessary to develop a new [product] it the result of their ingenuity and workmanship can be stolen so easily and the resultant product can be instantaneously undersold by the pirated copies.'" Bally/Midway Mfg. Co. v. USITC, 714 F.2d 1117, 1124 (Fed. Cir. 1983) (quoting approvingly from the ALJ's initial determination).

[3] "Both this court and the ITC have acknowledged that the quantum of proof of injury is less in the context of patent, trademark, or copyright infringement...than in other types of unfair trade practices, because the holder of the former type of rights is entitled to exclude competitors entirely from using the intellectual property covered by those rights." Textron Inc. v. USITC, 753 F.2d 1019, 1029 (Fed. Cir. 1985).

[4] See text accompanying note 19 *infra*.

It is harder to protect intellectual property rights when the infringing product is an import. Jurisdiction over the foreign producer in the district court is difficult to obtain,[5] and enjoining the current importer will often be ineffective when there are a variety of importers available.[6] In addition, no relief is available in federal district court for violations of process patents by imports.[7]

The Commission has a comparative advantage over the district courts in deciding intellectual property cases involving imports because it does not need personal jurisdiction; the presence of imports is sufficient to obtain a hearing before the Commission. The Commission may also exclude the offending product, a far more certain and effective remedy than an injunction against a particular person. Moreover, the Commission decides cases more rapidly than any district court.[8] This is particularly important when money damages will not be an effective remedy. In the case of infringing imports this is likely to be the case; damages are speculative, and the party over whom jurisdiction can be obtained will often be judgment proof. The Commission's power to issue quickly an exclusion order is the primary reason why complainants choose this forum. I see no reason, either in logic or law, why we should place an unnecessary burden in the form of an unduly rigorous injury test in their path. By applying a stricter injury test, the Commission majority allows foreign manufacturers and importers to engage in behavior proscribed to domestic parties. There is no policy reason for this anomaly.

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[5] The case sub judice is unusual in that regard in that Sumitomo has built a substantial facility in the United States.

[6] Neither Res Judicata nor Collateral Estoppel will apply to an importer who was not a party to an action. Hence unless the owner of the intellectual property right can join all potential importers of the infringing import, he will have to litigate separate actions against each infringer.

[7] The importation, sale or use within the U.S. of a product made in another country by a process patented in the U.S. is not an infringement of the process patent. 35 U.S.C. 271 (1982). An amendment to the statute which would have made it an infringement was rejected by the Senate in the last session. See 28 Patent Trademark & Copyright Journal 716 (BNA 10/18/84).

The actual application of the Section 337 injury and tendency to injure standards in patent cases has been similar to the standards used by district courts. For example, in Bally/Midway the CAFC quoted from the legislative history: "[W]here unfair methods and acts have resulted in conceivable losses of sales, a tendency to substantially injure such industry has been established.'"[9]

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[8] The Commission must conclude Section 337 cases within twelve months from the publication of notice of investigation in the Federal Register, or in more complicated cases, within eighteen months. 19 U.S.C. 1337(b)(1) (1982).

Moreover, the Commission has stated that when a patent has been infringed, "any evidence of lost sales...or acts that would lead to lost sales,...is probative of whether the infringing imports have an effect or tendency to substantially injure."[10] Complainant is required to demonstrate only that respondents' infringing importation or sales are likely to result in injury to the domestic industry.[11] Corning has met that burden.

The mistaken view that Congress intended the Commission to apply an injury test in Section 337 determinations as strict as the one employed in anti-dumping and countervailing duty investigations may originate in the fact that both provisions are part of the Tariff Act of 1930. That view ignores, however, the nature of the acts which Section 337 is intended to address. Those acts are wrongs and are universally recognized as such. They would be actionable under domestic tort, contract, trademark, copyright, patent, or antitrust law. This is in sharp contrast to the acts covered by the anti-dumping and countervailing duty provisions of Title VII. Dumping and subsidization are not wrongs in the same sense.[12] Unlike infringements of intellectual property rights which are unlawful[13] and in some cases may be crimes under other federal statutes,[14] dumping and subsidization are neither criminal offenses nor are they unlawful. Rather, they are acts against which the United States levies countervailing and antidumping duties[15] for the benefit of those who have suffered adversely from subsidized and dumped imports.

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[9] 714 F.2d at +1124 (quoting Trade Reform Act of 1973, H.R. Rep. No. 571, 93rd Cong. 1st Sess. 78 (1973) (emphasis added).

[10] Certain Trolley Wheel Assemblies, Inv. No. 337-TA-161, USITC Pub. 1605 at 11 (1984). In *Trolley Wheels*, the Commission found patent infringement, and in spite of trifling imports, found a tendency to injure and issued a general exclusion order.

[11] Certain Cube Puzzles, Inv. No. 337-TA-112, USITC Pub. 1334 at 33 (1983). In *Cube Puzzles*, the Commission found infringement of a registered trademark, false representation, and passing off of look-alike Rubic's Cubes, and issued a general exclusion order barring the importation of all infringing cubes.

It is not likely that Congress gave the Commission jurisdiction over Section 337 actions so it could apply the *substantive* injury analysis of Title VII cases to intellectual property infringements. Rather, it is the *procedural* character of Commission determinations that is most important in protecting intellectual property rights from infringement by imports. The

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[12] Many economists have suggested that subsidization by foreign governments and dumping by foreign firms provide net benefits to the nation that imports those products. *See, e.g.*, Kindleberger, Charles F., *International Economics* (1978). c. 8.

[13] 19 U.S.C. 1337(a) (1982). "Unfair methods of competition and unfair acts in the importation of articles into the United States...are declared unlawful...."

[14] *See, e.g.*, 17 U.S.C. 506 (1982) (declaring willful copyright violations to be a criminal offense and establishing criminal penalties) and 15 U.S.C. 1 & 2 (1982) (The Sherman Act, declaring certain trusts, restraints of trade, and monopolization to be unlawful and subject to criminal penalties).

[15] 19 U.S.C. 1671-78 (1982).

Commission is simply a more efficient forum than a district court in such cases.

. . . .

The majority has also incorrectly interpreted the facts in this case. Sumitomo recently completed construction of a factory in the United States to produce the same sort of fibers that are the subject of Corning's complaint. Thus, it might be argued that the infringing fibers are no longer likely to enter the U.S. market as imports.[*******************************] Therefore the completion of Sumitomo's domestic plant does not signal an end to the importation of infringing fibers. The dispute has not been mooted.

Sumitomo's imported and domestically-produced fibers have a synergistic impact on the American market. Sumitomo's marketing of its imported fibers supports the market for its domestic fiber, and vice versa. [****************************] the availability of an assured stream of imports will reassure customers of the reliability of Sumitomo, a new entrant to this market, as a supplier, and thereby make its domestically-produced fibers more attractive to consumers. All of Sumitomo's expected future sales of domestically produced fibers are therefore in part made possible by its infringing imports. Thus, Sumitomo's imports have a tendency to cause substantial injury even under a relatively strict test.

Further, the completion of Sumitomo's U.S. plant, rather than signaling an end to imports, may result in their increase.[********************]Thus the infringing imports will hurt Corning both directly, through increased lost sales to imports, and indirectly, by increasing Sumitomo's sales of its domestic product.

The magnitude of Sumitomo's imports are currently small. We must keep in mind, however, that Section 337 is designed to arrest unfair methods of competition in their incipiency.[16] The optical wave guide fiber industry is in its infancy. Its expected future growth is both great in size and uncertain in form. Unlike mature industries such as autos or steel, the market for optical wave guide fibers may increase ten-fold in a few years, and take a variety of twists and turns in terms of product applications and characteristics. Sumitomo's tiny market share this year may quickly grow large. Sumitomo's access to the domestic market may also provide it with information that will allow it to injure Corning's future exploitation of its patents.

Respondents' assertions to the contrary notwithstanding, the Commission need not limit itself solely to the effect of future imports or sales.[17] The infringing imports have already caused substantial injury to the domestic industry; they have enabled Sumitomo to learn about the character of the American market. Sumitomo has built a factory in the United States because it believes it can successfully market its product here. It gained valuable experience and information by testing the market through imports. Thus, those imports have already severely damaged Corning.

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[16] *See* Certain Surveying Devices, Inv. No. 337-TA-68, at 33-34 (1980). In an earlier case the respondent's device had been found to infringe a patent and was excluded. The manufacturer redesigned the product and sought advice from the Commission. The redesigned product, although it had not been imported for sale in this country, was found to violate the patent and was excluded from the country.

[17] *See* Certain Trolley Wheel Assemblies, Inv. No. 337-TA-161, USITC Pub. 1605 Initial Determination at 63 (1984) and cases cited therein.

A finding of injury would accord with both Commission precedent and that of our reviewing court. The CAFC has generally tacitly deferred to the judgment of the Commission on factual determinations of injury. One of the few cases where it reversed the Commission was *Bally/Midway Mfg. Co. v. USITC*.[18] In that case the Commission determined that the Pac-Man industry had been injured by infringing imports, and that the Rally-X industry had not. The Commission based its Rally-X determination on the fact that there was no longer a domestic industry manufacturing Rally-X machines. The Commission went on to conclude that a hypothetical Rally-X industry could not have been injured. The Commission held that complainant Bally/Midway was not entitled to relief under Section 337 because a domestic industry was no longer in existence when it decided the case, having been destroyed by trademark and copyright infringing imports of the video game, Rally-X. In reversing the Commission, the CAFC said, "[i]t is most unlikely that Congress, which enacted section 337 to 'prevent every type and form of unfair practice' and to provide 'a more adequate protection to American industry than any anti-dumping statute the country has ever had[,]' intended the statute to have such a bizarre effect. Sen. Comm. on Finance, S. Rep. No. 595, 67th Cong. 2d Sess. 3 (1922) (accompanying Tariff Act of 1922)."[19]

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[18] 714 F.2d 1117, 1124 (Fed. Cir. 1983).

Because the Commission's determination was internally inconsistent, the *Bally/Midway* court could not affirm the Commission and defer to its discretion on the finding of no injury to Rally-X. Bally/Midway's percentage losses on Pac-Man sales where the Commission granted relief were no greater than its losses on Rally-X. The court could hardly uphold both the finding of no injury to Rally-X and the finding of injury to Pac-Man. Forced to choose, it opted to provide relief for Rally-X. In reversing the Commission, the court stated: "Where the unfair practice is the importation of products that infringe a domestic industry's copyright, trademark, or patent right, even a relatively small loss of sales may establish, under Section 337(a) the requisite injury".[20]

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[19] *Id.* at 1121-22.

[20] *Id.* at 1124.

[21] All references in this opinion to the reasoning of the majority are based on conjecture. Some members of the Commission will not exchange draft opinions prior to publication.

The majority rests its determination[21] in this case on Textron Inc. v. USITC.[22] Textron appealed an ITC determination that: (1) it did not have a common law trademark right to the physical configuration and outward appearance of its vertical milling machines; and (2) that any injury caused by infringements of Textron's registered trademarks of its machines and false advertising of the imported machines portraying them with pictures of Textron's machines, was insubstantial. The Textron court affirmed the Commission and did not overturn Bally/Midway. In that respect Textron is one of the vast majority of cases in which the CAFC has deferred to the judgment of the Commission on questions that are not strictly matters of statutory construction, but rather are exercises of the Commission's expertise and discretion. It is part of a line of cases in which the court has affirmed the Commission and found a way to

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22. 753 F.2d 1019 (Fed. Cir. 1985).

rationalize the ITC's determination.[23]

Even if the *Textron* court was not merely seeking to justify the Commission's determination, but was making an independent judgment on the issue of injury, the case *sub judice* is clearly distinguishable. After disposing of the great bulk of complainant Textron's trademark claims, the court was left with "unfair acts of the respondents consist[ing] solely of false advertising by 12 firms and infringement of the registered trademarks 'Bridgeport' and 'Quill Master' by two firms."[24] The court then noted that the unfair act of false advertising was a less serious infringement of complainant's rights than a patent or trademark infringement, and that therefore claims based on such unfair acts had to meet a higher injury standard in order to get relief under Section 337. The court found that Textron had failed to meet this stricter standard.[25] With respect to the injury sustained as a result of the trademark infringement, it stated, "[t]he record shows that no attachments bearing the infringed 'Quill Master' trademark have been imported, [and] that a minuscule number of machines bearing the 'Bigport' mark were imported".[26]

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[23] See, e.g., Schaper Mfg. Co. v. USITC, 717 F.2d 1368 (Fed. Cir. 1983), in which the court affirmed the Commission's finding of no domestic industry, and distinguished such a finding from the Commission's finding of sufficient domestic activity to constitute a domestic industry in Certain Cube Puzzles, Inv. No. 337-TA-112, USITC Pub. 1334 (1983), Certain Airtight Cast Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126 (1981) and Certain Airless Paint Spray Pumps, Inv. No. 337-TA- 90, USITC Pub. 1199 (1981). In *Schaper* the domestic complainant was engaged in the design and quality control of imported toy trucks. The distinction between the extent of the domestic activities of the complainants' domestic activities in the other three cases, *Cube Puzzles* in particular, with that of Schaper, was questionable at best. In *Cube Puzzles*, complainant's only domestic activity was the spot checking and packaging of the imported cubes, while in *Stoves* and *Spray Pumps* it consisted of warranty repairs of imported products. Nevertheless, the CAFC managed to reconcile

The facts in this case are far different. In _Textron_, the CAFC was dealing with vertical milling machines, a product that had been on the market for over half a century, and for which infringing sales were 'minuscule' and showed no prospect of increasing substantially. The instant case involves a product on the technological frontier. Sales of the infringing fibers although small, are not insubstantial, and pose a very real threat to Corning.

I believe that Sumitomo's infringing imports have the effect and tendency to destroy or substantially injure an industry in the United States and I would issue a limited exclusion.

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[25] _Id._

[26] _Id._

Exh. 10

VIEWS OF CHAIRMAN LIEBELER AND VICE CHAIRMAN BRUNSDALE

Certain Unitary Electromagnetic Flowmeters

337-TA-230

The majority in this case has reversed an affirmative determination of the administrative law judge (ALJ) on the grounds that the unfair act has not had the effect or tendency to cause substantial injury to the domestic industry.[1] In contrast, we would modify and affirm the ALJ's decision.

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[1] Because we have not seen the majority opinion, our references to the majority's views are, at best, educated guesses. It is very difficult to write a dissenting opinion without seeing the majority opinion. Unfortunately, Commission practice of the last several years has been not to circulate opinions. Although we provided copies of a draft of this opinion to the majority to enable it to respond to our analysis, the majority declined to share their opinion with us. Courts and other agencies have found that the sharing of opinions produces better opinions. In our view, the lack of opinion-sharing at the Commission leads to inadequate, if any, joining of issues. The parties, the public, and the reputation of the Commission all suffer as a result.

I. Introduction

Section 337(a) of the Tariff Act of 1930, as amended, provides that unfair methods of competition and unfair acts in the importation of articles into the United States are unlawful if "the effect or tendency of the acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States . . . ."[2] Complainant, Fischer & Porter Company (F&P), proved the existence of the unfair act to the satisfaction of the ALJ and all the Commissioners by showing that respondents[3] imported and sold certain unitary electromagnetic flowmeters[4] that directly infringed U.S. Letters Patent 4,420,982 (the '982 patent) owned by complainant.[5] Complainant also succeeded in

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[2] 19 U.S.C. (1337(a) (1982) (emphasis added).

[3] Respondents are Krohne Messtechnik GmbH & Company KG and Krohne-America, Inc. Finding of Fact by the ALJ ("FF") 9.

[4] "Electromagnetic flowmeters are especially adapted to measure the volumetric flow rates of fluids which present difficult handling problems, such as corrosive acids, sewage and slurries." Initial Determination (hereinafter referred to as "ID") at 6.

[5] The '982 patent, titled "Unitary Electromagnetic Flowmeter With Sealed Coils," was issued on December

(Footnote continued to page 3)

convincing the ALJ and the Commission of the existence of a domestic industry that produces flangeless electromagnetic flowmeters made in accordance with the '982 patent.[6] Thus, our only disagreement with the majority concerns whether the effect or tendency of the unfair act is to cause substantial injury to the domestic industry.

II. The Determination of the ALJ

Complainant's business manager, Thomas Dimm, testified, and the ALJ found, that complainant did not maintain sales data for its flowmeters by unit size.[7] Mr. Dimm testified that overall sales were down[8] and

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(Footnote continued from page 2)
20, 1983. The patent has been assigned to F&P. ID at 5.

[6] Both complainant and respondents produce flowmeters of varying sizes. Complainant stipulated that only its MINI-MAG and K-MAG flowmeters between two and four inches in diameter were made in accordance with the patent. ID at 76. The ALJ found that only those imports of respondents measuring two inches or more in diameter infringe the patent. ID at 50-51.

[7] FF 491.

[8] FF 490.

that [ ] percent of complainant's total sales were accounted for by flowmeters made under the patent.[9]

One of the key determinants in establishing that an unfair act has caused substantial injury to a domestic industry is the market share held by the infringing imports.[10] Complainant urged the ALJ to make a simple market share calculation where the market would be defined as the aggregate sales of complainant and respondents of magnetic flowmeters between two and four inches in diameter. Using this method, import market share is over [ ] percent.[11]

The ALJ rejected such a straightforward calculation because he found that "non-infringing competition also exists, and should be thus part of the 'market'.

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[9] FF 492. The ALJ found "[t]he business manager has responsibility for the sale of all flow products including MINI-MAG and K-MAG flowmeters and is thoroughly familiar with F&P financial data such as profits and sales." Id.

[10] See note 27 and accompanying text, infra.

[11] This market definition was also urged by the attorney from the Commission's Office of Unfair Imports Investigation. ID at 86 n.48.

Therefore, an estimate of sales of competitive non-infringing magnetic flowmeters should also be included when estimating Krohne's market share."[12] Since no data existed on the two-to-four inch electromagnetic flowmeter market, the ALJ chose to extrapolate based on a market study of the flange and flangeless electromagnetic flowmeter industry.

This study, the Frost and Sullivan Report,[13] estimated that complainant's share of the overall magnetic flowmeter market was [to] percent in 1983.[14] The ALJ assumed that this would hold true for the two-to-four inch flangeless market as well and that this percentage continued in 1984 and 1985.[15] He therefore took [ ] percent of complainant's total sales and divided by [ ] to get the total sales for two-to-four inch flangeless electromagnetic flowmeters.[16] The ALJ then divided respondents' sales of these flowmeters by this total to obtain the market share of the infringing imports. Using this method, the ALJ concluded that respondents' market share increased from [ ] percent in 1982 to [ ] percent in 1983 and [ ] percent in 1984 before [declining to] percent in 1985.[17]

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[12] ID at 86 n.48.

[13] See FF at 498(a)-(d).

[14] The report was admitted into evidence in part because respondents, as well as complainant, relied on the information contained therein. ID at 86-87; FF 498(b).

[15] FF 498(c).

The ALJ next discussed at length sales allegedly lost by complainant to respondents' infringing imports. Complainant claimed that, after certain adjustments, respondents captured approximately [$] worth of sales of flowmeters two inches and over to common customers during 1984-85.[18]

The ALJ determined that because non-infringing competition was present, it could not be assumed that all of respondents' sales would have been captured by complainant. On this basis, the ALJ reduced the amount of sales lost by complainant to approximately [$] during 1984-85.[19] In 1984 this represented [ ] percent of aggregate sales of complainant and respondents for flowmeters two-to-four inches in diameter, and [ ] percent in 1985.[20] The ALJ concluded that the lost market share was significant.[21]

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[16] For example, total complainant's sales for all sizes multiplied by [=] flangeless two-to-four inches in diameter magnetic flowmeters sold in 1984. Thus, total market sales for the two-to-four inches in diameter magnetic flowmeters equaled [(divided by)].

[17] FF 498.

[18] ID at 88.

In addition, the ALJ found that the domestic industry was operating well below capacity, inventories were increasing, and price competition existed between the products. Therefore, after a review of the record, he concluded that "complainant has met its burden of proof by a preponderance of evidence that the domestic industry has been substantially injured by the respondents' activities in the United States."[22]

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[19] ID at 92. The ALJ found that causation would be shown if (1) complainant lost sales to respondents rather than to non-infringing competition, and (2) respondents' sales were at the expense of complainant, not at the expense of the non-infringing competition. ID at 88. The first criterion was satisfied when respondents made a sale to one of complainant's customers. The second criterion was met when complainant offered to sell a comparable patented product during a comparable period to a purchaser of respondents' product or when the purchaser considered complainant's product to be an alternative to respondents product. The ALJ found that only about 15 percent of $[ ] of sales [($)] of infringing goods by respondents constituted "lost sales."

[20] ID at 92.

[21] ID at 94.

Finally, the ALJ found that respondents have demonstrated "the ability to compete effectively in the United States, and the intention to remain a factor in the United States market."[23] He therefore also determined that respondents' imports had a tendency to substantially injure the domestic industry.

III. Opinion

The decision in this case follows closely on the heels of Corning Glass Works v. USITC, in which the Court of Appeals for the Federal Circuit affirmed the

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[22] ID at 94.

[23] ID at 98. The ability to compete was based on the level of sales by respondents. The finding of the intent to remain in the U.S. was based on sales trends over the past few years, in addition to the presence of [ ] sales representatives for respondents. FF 690.

Commission's determination in Certain Optical Waveguide Fibers.[24] In Optical Waveguide Fibers, the Commission found that imports of products infringing a U.S. patent did not have an effect or tendency to substantially injure the domestic industry producing optical waveguide fibers because infringing imports were *de minimus*.

In affirming the Commission's determination, the court rejected appellant's argument that earlier precedent stood for the proposition that "unfair methods or acts that result in even 'conceivable losses of sales' establish injury to the domestic industry."[25] The court stated that appellant's "proposed 'test' for injury may be easily rejected as statutorily impermissible . . . ."[26] Thus, it has been firmly established that something more than a *de minimus* level of sales of infringing product is required to satisfy the statutory injury test.

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[24] Corning Glass Works v. USITC, 799 F.2d 1559 (Fed. Cir. Aug. 27, 1986), *aff'ing* Certain Optical Waveguide Fibers, Inv. No. 337-TA-189, USITC Pub. 1754 (1985).

[25] 799 F.2d at 1568.

[26] *Id*.

The Corning Glass Works court, however, did not enunciate what exactly this "something more" is. The court stated:

> [I]t would be difficult to articulate positively what quantum of injury is legally required. Indeed, the question of quantum of injury is not one on which it would be appropriate for this court to put forth a legal standard. The statement in Textron that "the infringer holds, or threatens to hold, a significant share of the domestic market in the covered articles or has made a significant amount of sales of the articles" gives guidance, but it is not definitive of the considerations relevant to the injury inquiry.[27]

The majority's search for other "relevant" considerations has led it to increase the burden on complainants in intellectual property cases beyond that contemplated by statute.[28]

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[27] Id. (quoting Textron, Inc. v. USITC, 753 F.2d 1019, 1029 (Fed. Cir. 1985).

[28] The standard of review for Commission section 337 injury determinations is a low one. The court in Corning Glass Works noted:

> In any event, determination of injury is precisely the type of question for which the Commission has the expertise and has been given the responsibility to answer. Moreover, the

(Footnote continued to page 11)

The instant investigation presents a clear example of overburdening the complainant by requiring additional proof. As noted earlier complainant, responding to the "guidance" provided in Textron, presented evidence demonstrating that respondents had sold a large amount of infringing imports and that respondents held a large share of the domestic market.[29] It should be noted that the guidance in Textron was given in the disjunctive: significant level of sales or significant market share. The ALJ found convincing evidence on both.

Respondents' sales of infringing flowmeters during

(Footnote continued from page 10)

> determination of injury necessarily must be based upon the particular facts of each case. In view of these considerations, the appropriate function of this court is to review an injury determination to decide whether substantial evidence supports the facts relied on and whether the Commissioner's [sic] determination, on the record, is arbitrary, capricious, or an abuse of discretion.

799 F.2d at 1568 (citations omitted). Nonetheless, in certain circumstances, the Federal Circuit will reverse. See Bally/Midway Mfg. Co. v. USITC, 219 USPQ 97 (Fed. Cir. 1983), reversing In re Certain Coin-Operated Audiovisual Games and Components Thereof, Inv. No. 337-TA-105, 218 USPQ 924 (USITC 1982).

[29] See text accompanying note 27 supra.

1984-85 were valued at over [$][30] and additional sales occurred in the first quarter of 1986.[31] It is clear from Corning Glass Works that the Commission must look beyond the volume of respondents' sales.[32] Comparing respondents' sales to complainant's sales shows that [$] represents a substantial loss of sales revenue and associated profit for complainant.[33] Had complainant made these sales, its sales revenue would have increased more than 7 percent during this period.[34] This magnitude of sales is clearly significant.

Much of the argument by complainant, respondents, and presumably the majority focuses on what fraction of the infringing sales constitutes "lost sales." Complainant argued that respondents' sales to customers common to complainant and respondents totaled [$]. The ALJ's finding with respect to lost sales was that complainant's actual losses to respondents totaled only [$].[35]

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[30] FF 562 (based on respondents' exhibit).

[31] FF 563.

[32] The Corning Glass Works court held that "whether the amount is 'significant cannot be determined by the dollar amount in vacuo." 799 F.2d at 1559.

[33] FF 490.

[34] The actual increase in sales revenue would depend on the sensitivity of demand to changes in price (demand elasticity) for flowmeters.

It is our understanding that the majority concluded that the value of the lost sales was even lower.[36] Among the reasons probably given were that some of respondents' sales consisted of products that improved on the patent, and that other sales would not have gone to complainant because of lower bids by producers of non-infringing flowmeters.

Arguing over whether sales by respondents would have gone to complainant's legitimate competitors is a case of Monday morning quarterbacking. For example, the ALJ found that "[b]ased on the fact that Krohne and F&P competed directly for sales to [ ], sales by Krohne to [ ] could have gone to F&P."[37] This is a reasonable conclusion. To conclude otherwise that a competitor with a different product (for example, one not produced under the claims of the patent) would have won the contract simply because of a lower bid is to assume that the products are identical in every respect except for price. Clearly, if the competing product is not produced under the patent, it cannot be identical to the patented product. Price differentials are to be expected with differentiated products. The lower priced product is usually lower priced for a reason (lower quality, less valuable warranties, slower delivery, etc.). Although it is possible that the competing product would be selected in the absence of the infringing product, the choice of the infringing product is some evidence that the purchaser preferred the patented features.[38] It cannot be known

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[35] See notes 18-21 and accompanying text for a discussion of the ALJ's analysis.

[36] See note 1 supra.

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[37] ID at 91.

[38] The ALJ found that the flangeless construction claimed in the '982 patent contributed to the compact size of the flowmeters and had a "profound effect on increasing market penetration." He also found that respondents had discussed marketing such a product as early as 1965. ID at 84; FF 533(a).

A corollary to this argument is that sales of higher priced infringing products can, and do, cause

(Footnote continued to page 15)

who would have captured these sales. Moreover, because respondents are not entitled to any sales of products that infringe complainant's patent or that improve on that patent,[39] requiring evidence that complainant would have made a given sale is unnecessary in a section 337 case.

The above argument illustrates part of the problem and the unnecessary effort involved in trying to assess which sales were "lost" by complainant. In cases involving intellectual property rights, everyone agrees that the owner of the right is entitled to all sales of products covered by the patent. The simplest and most

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injury to the domestic industry. If the infringing flowmeter lasts twice as long as the legitimate product, purchasers might be willing to pay twice as much for it. If there were no infringing product, however, the purchaser might buy two legitimate products. This example is one of an infinite number of circumstances in which one would expect the domestic producer to be harmed by a higher priced infringing import. The majority may have determined that the absence of "underpricing" is relevant to the Commission's determination. See note 1 supra.

[39] Corning Glass Works, 799 F.2d at 1567 ("Corning cannot be faulted in its analysis that a patentee is entitled to benefit from all sales in the United States covered by its patent and that diversion of any sales by an infringer without payment of royalties is legally and in fact an economic loss to the patentee").

legitimate measure of the harm is total sales of the infringing good.

The Federal Circuit has not instructed the Commission to look beyond this statistic and develop counterfactual inquiries. According to the court in Textron, "the domestic industry must normally establish that the infringer holds, or threatens to hold, a significant share of the domestic market in the covered articles or has made a significant amount of sales of the articles."[40]

Instead of determining when a sale of an infringing good is "lost" by complainant, what the Commission should do is to determine when the level of sales is significant for a particular industry. In Corning Glass Works the court stated:

> Corning asserts that Sumitomo's past sales have caused substantial injury because the amount of Sumitomo's sales has totaled several million dollars. Corning asserts that this amount ipso facto meets the "test" of Textron that an injury is shown where sales are of a "significant amount." As indicated above, the amount of sales is highly

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[40] 753 F.2d at 1029; accord, Corning Glass Works, 799 F.2d at 1568.

relevant to the injury determination; however, whether the amount is "significant" cannot be determined by the dollar amount in vacuo. "Significant" requires some further inquiry once the amount of sales is found. Corning's comparison of the dollar amount of Sumitomo's sales to SpecTran's investment in its plant and to ITT's profit figures is unpersuasive as a basis for deciding whether the amount of the infringing sales is "significant." Conversely, the ALJ's comparison of Sumitomo's sales with the total sales of fiber in the U.S. market, as well as with the volume of sales of Corning and its domestic licensees, is meaningful and the conclusion that Sumitomo's sales were de minimus in those contexts is rational. Thus, there is no basis for holding that this part of the Commission's decision is arbitrary or capricious.[41]

The significance of respondents' sales was discussed above.[42] As for market share, the ALJ presented several indicators. The first measured respondents' infringing sales as a share of total market sales of flangeless electromagnetic flowmeters sized two-to-four inches in diameter.[43] This produced a market share for respondents of [ ] percent in 1984 and [ ] percent in 1985.[44] The second measured complainant's "lost sales" as a share of respondents' and complainant's combined sales of these two-to-four inch meters. Under this method, respondents' share was between [ ] and [ ] percent in 1984-85.[45]

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[41] 799 F.2d at 1569.

In Corning Glass Works the court does discuss certain findings by the ALJ relating to "lost sales." Id. The court seems to accept the proposition that sales were not lost where "Corning and its licensees could not satisfy demand for the product, despite increasing their capacities, that they had put customers on allocation; and, indeed, that they were themselves importing fiber in order to fill orders." Id.

It is unclear whether the court actually accepted this argument ("Thus, the evidence, per the ALJ, did not establish a nexus between Sumitomo's sales and any past injury to the domestic industry." Id. at 20 (emphasis added)). This issue need not be addressed because this case is distinguishable. The ALJ in this case clearly found that complainant is not operating at full capacity whereas in Corning Glass Works the complainant was operating at full capacity. ID at 86.

The final indicator measured respondents' infringing sales as a share of respondents' and complainant's combined sales of the flowmeters in question. Using this method, respondents' share was [ ] percent in 1984 and [ ] percent in 1985.[46]

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[42] See notes 30-34 supra and accompanying text.

[43] Several other companies sell flangeless flowmeters. FF 520.

[44] FF 498(c).

[45] ID at 92-93.

[46] ID at 87. Both the second and third measure define the market as only the sales of complainant and respondents.

The Federal Circuit appears to sanction the use of at least the first and third methods of determining market share.[47] We believe that the third is the best indicator in a case involving intellectual property rights. It is best because the owner of the property right is entitled to all sales involving the exploitation of the right. In fact, although the Federal Circuit in Corning Glass Works appears to sanction the use of both measures, the court in Textron clearly stated that the appropriate test is whether the "the infringer holds, or threatens to hold, a significant *share of the domestic market in the covered articles*."[48] Respondents have captured a large share of the sales entitled to complainant. Thus, the record indicates that significant sales *and* significant penetration are present, although only one of these is required under *Textron* to find an effect of the imports to substantially injure the domestic industry.[49]

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[47] See note 41 supra and accompanying text. The court's discussion in Corning Glass Works was based on the ALJ's finding in Certain Optical Waveguide Fibers which provided in relevant part:

> ... Given these multiple sources of fiber outside of the domestic industry, it is not clear that respondents' sales and market share were gained at the expense of the domestic industry. See Spring Assemblies, at 43-44, Drill Point Screws, at 20-21.
>
> In any event, the record indicates that respondents' importation and sales of optical waveguide fiber and cable in the United States are de minimus in comparison to both the United States market as a whole, as well as the volume of sales by Corning and its domestic licensees.

Certain Optical Waveguide Fibers, Inv. No. 337-TA-189, USITC Pub. 1754 (Sept. 1985), ID at 105; see also id. at 110 (discussion of market share in context of tendency to injure).

In addition to requiring complainant to prove that it would have made the sales that respondents made, the majority would make complainant prove its losses with evidence that is documentary in form and up-to-the-minute. We believe that the majority insists that there is an insufficient basis in the record to support the ALJ's conclusion that [ ] percent of complainant's sales of electromagnetic flowmeters were produced under the patent. The majority thus disregards uncontradicted testimony by complainant's national sales manager, Mr. Dimm, who testified that [ ] percent of its sales of electromagnetic flowmeters were produced under the patent.[50] Admittedly, Mr. Dimm said that complainant did not maintain sales data on the basis of unit size and that his [ ] percent figure was an estimate. He also testified, however, that complainant relies on market share estimates based on this figure to make business decisions.[51] The ALJ determined that Mr. Dimm's testimony was corroborated by respondents.[52]

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[48] *Textron*, 753 F.2d at 1029. Indeed, it is unclear when it would be relevant to calculate market share based on a domestic market broader than the covered articles. Using this broader market definition would preclude relief in any market where the patent had successfully captured a small niche. For example, an inventor of a new type of flowmeter might capture a lucrative 1 percent of the market. An infringer might then take 30 percent of that 1 percent, giving the infringer only a 0.3 percent share of the "total" market. Clearly, the relevant indicator for a patent holder entitled to all the sales under the patent is the 30 percent of its sales captured by the infringer.

[49] See text accompanying note 29 *supra*.

The ALJ found Mr. Dimm to be a competent witness. Mr. Dimm, an employee of complainant for 11 years who has had his current position since 1981, is the individual most knowledgeable about the number and sizes of magnetic flowmeters sold by complainant.[53] His oral testimony was entitled to the weight given to it by the ALJ.

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[50] See notes 7-9 _supra_ and accompanying text.

[51] Transcript of Hearing _in re_ Certain Unitary Electromagnetic Flowmeters with Sealed Coils ("Transcript"), at 509-10.

[52] _See_ FF 498(b) (respondents rely on Frost and Sullivan report); FF 493 ([-] percent of respondents' production consists of two-to-four inch meters).

Documentary evidence is typically not required to prove an offense under U.S. criminal or civil law. Oral testimony of a competent witness is often more reliable and probative than documents. Only in rare circumstances, which we need not be concerned with here, is the absence of documentary evidence dispositive.[54]

Nowhere in the statute is it required that complainants provide documentary evidence to the Commission. Commission rules provide that the complaint should include "a statement of facts indicating the effect or tendency to substantially injure. Such a statement would normally include the volume and trend of production, sales, and inventories of the involved domestic article

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[53] FF 492.

[54] For example, cases involving the Statute of Frauds require documentation.

...."[55] Again, the rule does not preclude complainant from basing its statement on the knowledge of an informed individual rather than on a compilation of invoices.[56] The only possible relevance of the lack of "written support or calculation to support the witness' approximation of the domestic industry component of Mini-Mag flowmeters"[57] might be to the credibility of the witness. The ALJ is a seasoned lawyer and administrative law judge and thus has substantial expertise in weighing evidence and in determining credibility. He had the opportunity to hear and see the witness, whereas the Commissioners had only a cold transcript and did not hear or see the witness. In the absence of conflicting evidence, it is bad practice as well as arbitrary for the Commission to reverse the ALJ on the competence and credibility of Mr. Dimm. If the Commissioners were concerned about the credibility of a witness, rather than reversing the ALJ on the basis of the transcript, they should have had a hearing and heard the witness.[58]

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[55] 19 C.F.R. { 210.20(a)(8) (1984).

[56] If the rule were to be read to require written records, it would probably be outside of the scope of the Commission's authority.

[57] Review Brief of Respondents, at 12 (Sept. 30, 1986).

Respondents could have undertaken to calculate the exact level of relevant sales. Complainant apparently determined that it was unnecessary for its day-to-day operations to maintain such data and that it would be too expensive to prepare such information solely for use in this proceeding.[59] Complainant did, however, make the relevant invoices available to respondents. Respondents' failure to take advantage of this opportunity may indicate that they too found that such an endeavor would be an unwise investment of time and money. Whatever the reason, Mr. Dimm's testimony is credible and believable.

As described above, the ALJ used the [ ] percent estimate along with the [ ] percent figure from the Frost and Sullivan Report to calculate the first market share measure: respondents' infringing sales as a share of total market sales of flangeless electromagnetic flowmeters sized two-to-four inches in diameter.[60] The majority's criticism of this measure may be two-fold. First, the majority may find fault with the use of the [ ] percent estimate of production. This has already been adequately discussed. Second, the Frost and Sullivan Report only provides market share data through 1983. Thus, the majority may argue that the Report is out of date and cannot be used to measure market share in 1984 and 1985. This argument fails in the absence of evidence that complainant's market share has decreased since 1983. Unless such evidence exists, the estimated penetration provides a lower bound on respondents' share of the market. If complainant's share has actually increased, then respondents estimated share would be higher.[61] No

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[58] The issue of credibility is typically in the domain of the trier of fact, as are determinations of fact. Although the Commission has the power to review these issues de novo, both administrative economy and the protection of the parties' rights are best served when some deference is given to the ALJ on these matters.

[59] Complainant's Submission on the Issues Under Review (Sept. 26, 1986), at 15-16.

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[60] See notes 12-17 & 43-44 supra and accompanying text.

[61] Complainant testified that its share of the flangeless market is approximately [50] percent. FF 498, 498(d). The attempt by respondents to argue that this impugns the reliability of the Frost and Sullivan Report is unsuccessful. Reply of Respondents, at 10-14. For example, using the numbers for 1984, see

(Footnote continued to page 26)

evidence has been presented to indicate that complainant's market share has decreased. Moreover, the Frost and Sullivan Report has no relevance for either the second or the third measure of market penetration.[62] Under these circumstances, a new comprehensive market share study should not be required.

The ALJ also used the [ ] percent estimate to allocate financial and production data, with the obvious result that the relevant portion of complainant's operation followed the same financial trend as the total operation. The ALJ justified this calculation on the grounds that complainant used the same production facilities and employees for the manufacture of flangeless magnetic flowmeters of all sizes. He thus determined that "it is unlikely that profitability, employment and capacity data

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(Footnote continued from page 25)
note 16 supra, if complainant's share of the two-to-four inch flangeless flowmeter market was [ ] percent, total sales in the market would be [ ], instead of [ ]. Respondents' share would obviously be higher. If the market share for complainant has increased since 1983, any resulting error in the calculation of respondents' share would clearly be harmless error.

[62] See note 46 supra and accompanying text.

for the industry at issue could involve more than a simple allocation, and such an allocation would have no effect on trends."[63] Respondents claim that this proposition is without any factual, logical or legal basis,[64] but do not set forth any reason for this assertion.

[ ] percent of complainant's production is accounted for by articles that exploit the patent. Production of the patented articles occurs on the same machinery with the same employees as the flowmeters outside the claims of the patent. The products that are not within the claims of the patent are smaller versions of the same product. In the absence of contrary evidence, one reasonable inference to draw would be that demand and supply for the patented and non-patented products are determined by the same or similar factors.[65]

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[63] FF 492.

[64] Respondents' Review Brief at 10.

[65] One variable that is not constant over the last few years is that the patent was issued in late 1983. One might draw the inference that competitors would shift production from the product with patent protection to the ones without. Thus, while complainant's overall sales might be steady or down, sales of the patented

(Footnote continued to page 28)

Moreover, even if complainant maintained separate profit-and-loss data for the covered products, such data would be inherently suspect.[66] It is true that sales data might be more reliable than the estimate. There is no reason to believe, however, that the cost allocations chosen by complainant would have been more accurate or, for that matter, different than the estimates on the

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(Footnote continued from page 27)
product by complainant might be up. No evidence was presented with respect to this argument. Conversely, Mr. Dimm testified that "the product lends itself to a similar distribution of [sales by] sizes." Transcript, at 509 (May 15, 1986).

[66] Because complainant did not maintain this data in the regular course if business, if it had simply prepared such data for the purpose of this investigation, the information would lack credibility because no incentive would be present to produce accurate data. The rationale for the exception to the hearsay rule for business records is informative on this issue. Regularly kept business records are admissible because of their "unusual reliability. ... The very regularity and continuity of the records are calculated to train the recordkeeper in habits of precision; if of a financial nature, the records are periodically checked by balance-striking and audits; and in actual experience the entire business of the nation and many other activities function in reliance upon records of this kind." McCormick on Evidence (306 (Lawyer's ed.) (3d ed. 1984); Fed. R. Civ. P. 803(6). Thus, the ALJ would have been in the same position of judging the credibility of the witness who presented the data.

record. The allocation of certain common costs of production (e.g., manufacturing overhead) to distinct products is difficult at best.[67]

Complainant is being held to a remarkably high burden of proof by the majority.[68] This is in direct contrast to the holdings of the Federal Circuit and past precedent of the majority. In Textron, the Federal Circuit noted:

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[67] See C. Horngren, Cost Accounting, A Managerial Emphasis 510 (5th ed. 1982).

The relevance of complainant's profit-and-loss data is questionable. Evidence indicating that a complainant's sales and profit margins are increasing might indicate that a firm's financial condition is improving. Such evidence might even show that a firm is doing well. It does not, however, demonstrate the absence of adverse effects of the infringing goods. One recent analysis of section 337 correctly recognized that "an examination of trends in prices, profits, sales, capacity utilization, and inventories tell us more about supply and demand conditions in the industry and in the economy then about the effects of infringement." Feinberg, The Interpretation of Injury Under Section 337, 31 (unpublished study written under contract to USITC).

[68] According to a recent study by the Government Accounting Office, many domestic patent holders chose to forego seeking relief at the Commission because of the high price of section 337 litigation. A GAO survey found that costs ranged from $100,000 to $1 million, with the costs of some cases as high as $2.5 million. The level of proof required by the majority will add to this cost and cannot but dissuade other aggrieved parties from seeking relief. Statement of Allan Mendelowitz, Associate Director, National Security and International Affairs Division, GAO, before the Subcommittee on International Trade of the Senate Committee on Finance (May 14, 1986).

> Both this court and the ITC have acknowledged that the quantum of proof of injury is less in the context of patent, trademark, or copyright infringement, however, than in other types of unfair trade practices, because the holder of the former type of rights is entitled to exclude competitors entirely from using the intellectual property covered by those rights. See Bally/Midway, 714 F.2d at 1124, 219 USPQ at 102; In re Spring Assemblies and Components Thereof, ITC Pub. No. 337-TA-88, 216 USPQ 225, 243 (1981).[69]

For the majority to agree that the "quantum of proof" is lower in a patent case than in a non-intellectual property rights case and then to require mathematical precision with respect to market share and profit and loss data is inconsistent and unreasonable.[70] One can only guess

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[69] 753 F.2d at 1029.

[70] The Textron court cited the Commission's decision in Certain Spring Assemblies and Components Thereof with approval. In Spring Assemblies, the Commission still recognized the relevance of intellectual property law to section 337:

> Under patent law, a patent is a lawful monopoly, and the owner of a valid patent is entitled to 100 percent of the domestic market for the product covered by the patent. Thus, all sales of infringing articles covered by a patent rightfully belong only to the patentee (and/or any

(Footnote continued to page 31)

what would be involved in meeting the higher quantum of proof required in a non-intellectual property rights case.

With certain modifications to the lost sales discussion,[71] we would affirm the ALJ's determination

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(Footnote continued from page 30)

> licensees). Similarly, any share of the market for a patented article held by an infringer represents a market share that rightfully belongs only to the patentee (and/or any licensees). In determining causation in patent-based cases under section 337, we take into account this rule of patent law. Further, we believe that the requisite connection between the imports and substantial injury to the domestic industry is usually established where it is shown that an infringer holds a significant share of the domestic market for articles covered by the patent or that an infringer has made a significant amount of domestic sales of the covered articles, as such sales rightfully belong only to the patentee. ... This obviously does not contemplate that a single sale lost by a patent holder will automatically result in substantial injury.

Spring Assemblies, at 43-44. The view expressed above is one rational interpretation of the injury requirement and the Federal Circuit in Textron and Corning Glass Works relies extensively on this passage. Unfortunately, the Commission added one additional sentence: "The complainant is not released from the burden of establishing substantial injury, or of showing the requisite causal connection between the imports and injury." It is difficult to find a connection between this sentence and the earlier quoted sentences. Nor is it easy to rationalize it with the Federal Circuit's holdings that the quantum of injury is judged by the level of infringing sales and market share.

[71] We believe that it was improper for the ALJ to look beyond the volume of sales by respondents.

(Footnote continued on page 32)

that respondents' imports have had an effect to cause substantial injury to the domestic industry. We would also affirm his determination that a tendency to injure the domestic industry has been proven.[72]

(Footnote continued from page 31)
Although such an inquiry may be relevant in determining whether a patent holder in a district court action is entitled to lost profits as opposed to a reasonable royalty, see King Instrument Corp. v. Otari Corp., 767 F.2d 853, 864 (Fed. Cir. 1985), the Commission is not engaged in such an inquiry. See notes 37-41 supra and accompanying text.

[72] See note 23 supra and accompanying text. In general, evidence of an effect to cause injury will also suffice to prove tendency to injure.

Exh. 13

Affirmative Final Votes

ITC INV. NO.	SUBJECT	COUNTRY
Antidumping (731)		
149	Barium Chloride	China
151	Carbon Steel Plate	Korea
155	Choline Chloride	Canada
196	Certain Red Raspberries	Canada
240	Photo Albums & Filler Pages	Hong Kong
241	Photo Albums & Filler Pages	Korea
259*	Offshore Platform Jackets	Korea
260*	Offshore Platform Jackets	Japan
262**	Iron Castings	Brazil
263**	Iron Castings	Canada
264**	Iron Castings	India
265**	Iron Castings	China
287	In-Shell Pistachio Nuts	Iran
297	Porcelain-on-steel Cookingware	Mexico
298	Porcelain-on-steel Cookingware	China
299	Porcelain-on-steel Cookingware	Taiwan
308	Butt-Weld Pipe Fittings	Brazil
309	Butt-Weld Pipe Fittings	Japan
310	Butt-Weld Pipe Fittings	Taiwan
338	Urea	East Germany
339	Urea	Romania
340	Urea	U.S.S.R.
347	Malleable Cast Iron Pipe Fittings	Japan
348	Malleable Cast Iron Pipe Fittings	Thailand

355	Silica Filament Fabric	Japan
Countervailing duty (701)		
209	Carbon Steel Wire Rod	Spain
Escape Clause (201)		
52	Unwrought Copper	
55	Nonrubber Footwear	

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* indicates that the vote was technically a "partial", but for the purposes of this table was designated as "affirmative" on the basis of the relative dollar volume of the products in question. For example, when the affirmative portion of the determination was made for the product subject to investigation involving the larger dollar volume, that vote is designated as "affirmative" in this table. This results in two "partial" votes being assigned to the "affirmative" votes listed here.

** negative on heavy iron castings; affirmative THREAT on LIGHT iron castings.

Exh. 14

SUBSTANTIAL INJURY

The complainant in a section 337 investigation must show that respondents' unfair methods of competition and unfair acts have the effect or tendency to destroy or substantially injure the domestic industry. 172/ Satisfaction of section 337's injury requirement does not automatically follow from proof of infringement of an intellectual property right. 173/ Complainant bears the burden of establishing both injury and a nexus between the unfair acts and the injury to the domestic industry. 174/ The owner of a patent, who is entitled to exclude others entirely from exploiting the patent, is required to show a smaller quantum of injury in order to prevail under section 337 than would be required in a non-intellectual property right case. 175/ The Federal Circuit has declined to articulate a particular quantum of injury necessary to satisfy the injury requirement, holding that

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171/ To the extent not inconsistent with the foregoing discussion, we adopt the ALJ's findings of fact concerning domestic industry.

172/ 19 U.S.C. § 1337(a). Tendency to substantially injure is discussed below.

173/ Corning Glass Works v. U.S. International Trade Commission, 799 F.2d 1559, 1566 (Fed. Cir. 1986); Textron v. U.S. International Trade Commission, 753 F.2d 1019, 1028 (Fed. Cir. 1985).

174/ Optical Waveguide Fibers, Inv. No. 337-TA-189, USITC Pub. No. 1754 (1985), *aff'd sub nom.* Corning Glass Works v. U.S. International Trade Commission, *supra*; Drill Point Screws, Inv. No. 337-TA-116, USITC Pub. No. 1365 (1983).

175/ Corning Glass Works, v. U.S. International Trade Commission, *supra*; Bally/Midway v. U.S. International Trade Commission, 714 F.2d 1117, 1124 (Fed. Cir. 1983).

determination of injury is the type of question which the Commission is best suited to answer, on the basis of the particular facts of each case.[176]

While there is no all-inclusive standard, the domestic industry must normally establish that the infringer holds, or threatens to hold, a significant amount of the domestic market for the product in question or has made signiificant sales of that product.[177] The specific level of any indicator of injury is not dispositive of the issue of substantial injury, and the Commission considers the special characteristics of each industry in assessing its condition.

We adopt the ALJ's conclusion that TI's DRAM business suffered substantial injury in 1986.[178] Employment and production in the United States declined, and TI suffered [   ] losses in 1985 and 1986 on its domestically-produced DRAMs.

We believe that the conclusion that infringing imports of Samsung 64K and 256K DRAMs have contributed to substantial injury to the domestic industry is warranted by the evidence of record.[179]

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[176] Corning Glass Works v. U.S. International Trade Commission, supra, at 1568.

[177] Textron Inc. v. U.S. International Trade Commission, supra, at 1029.

[178] ID at 807.

[179] The only infringing imports remaining under investigation are Samsung's imports of 64K and 256K DRAMs. The ALJ determined, and we affirm the determination, that Samsung's 64K and 256K DRAMs literally infringe the '701 patent, and that Samsung's 256K DRAMs literally infringe the '500 and '843 patents. With respect to Samsung's DRAMs, we have reversed only the ALJ's determination that Samsung's 64K and 256K DRAMs infringe the '764 patent under the doctrine of equivalents.

Samsung's U.S. market share for 64K DRAMs [ ] during all four quarters of 1985, [ ] during the first two quarters of 1986, and [ ] again during the third quarter of 1986. The domestic industry's [180] U.S. market share for 64K DRAMs declined throughout 1985 and the first three quarters of 1986. [181] Samsung's market share for 1985 was [ ] percent, while the domestic industry held [ ] percent of the market. Samsung's market share during the first three quarters of 1986 was [ ] percent, while the domestic industry's share fell precipitously to [ ] percent. Samsung's market share was subtstantial during this period, while TI was suffering losses.

The transitional period for 64K and 256K DRAMs occurred in early or mid-1985. [182] The record demonstrates that consumption of 64K DRAMs, as would be expected, declined substantially during the entire period 1985-86. [183] Thus, the domestic industry lost market share during a period of declining U.S. consumption, while infringing imports increased and held a significant share of the U.S. market for the 64K DRAMs.

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[180] The portion of the domestic industry devoted to production of 64K DRAMs consists only of [ ] There was no proof offered that any other domestic DRAM producer manufactured 64K DRAMs in connection with any of the patents at issue, with the exception of [ ] which the ALJ determined practiced the '764 patent until it shut down operations in [ ] However, we have determined that [ ] is not part of the domestic industry.

[181] ID Appendix A at 22, Table 12a.

[182] The ALJ defined the transitional period as the point where the price of a newer generation, higher density, DRAM had declined to four or five times the price of the prior generation, at which point the newer generation becomes competitive in the market. DRAM users will design equipment to accomodate the new generation, and newer DRAMs tend to be substituted for the older DRAM, since the price of the newer DRAM is low enough. A residual market will remain for the older generation DRAM, although the cost _per bit_ of memory will eventually become higher for the older generation, for those uses where the older generation provides sufficient memory capacity, if the cost _per unit_ of the older generation remains below the cost per unit of the newer generation.

[183] Appendix A at 21, Table 12.

Samsung did not import any 256K DRAMs until 1986. Infringing imports of Samsung 256K DRAMs [ ] from [ ] percent of domestic consumption in the first quarter of 1986, to [ ] percent in the second quarter, and to [ ] percent in the third quarter. The domestic industry's [184] market share decreased from [ ] percent in the fourth quarter of 1985, [185] to [ ] percent in the first quarter of 1986, then increased to [ ] percent in the second quarter, and to [ ] percent in the third quarter. Overall, the domestic industry accounted for [ ] percent of domestic consumption during the first three quarters of 1986, while Samsung's imports accounted for [ ] percent. TI, considered alone, accounted for [ ] percent of domestic consumption in the first two quarters of 1986, and [ ] percent of domestic consumption in the third quarter. [186] Samsung's U.S. market share for 256K DRAMs was substantial and increased, indicating that Samsung's infringing imports were a cause of substantial injury to the domestic industry.

U.S. consumption of 256K DRAMs increased significantly throughout 1985-86. The share of consumption accounted for by non-infringing imports and non-domestic industry 256K DRAMs was [ ] percent in the first quarter of 1986, [ ] percent in the second quarter, and [ ] percent in the third quarter. In an expanding market for 256K DRAMs, Samsung's ability to rapidly increase its market share to a significant level indicates that infringing Samsumg imports were a cause of substantial injury.

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[184] The portion of the domestic industry devoted to production of 256K DRAMs includes TI's operations and NECEL's California operations producing 256K DRAMs under the '500 and '843 patents.

[185] Only NECEL was producing 256K DRAMs at this time. TI did not sell any of its domestic 256K DRAM production during 1985.

[186] ID Appendix A at 31, Table 15a.

Since the record contains no evidence of downstream imports containing infringing Samsung DRAMs, we have not considered downstream imports in determining causation of substantial injury by infringing Samsung imports. Similarly, since there is no evidence in the record as to the volume (or price) of infringing Samsung DRAMs imported through the gray (parallel) market, we have not considered such imports in assessing causation of substantial injury by Samsung's infringing imports.

Based on the evidence in the record of this investigation, we conclude that the significant volumes of imported infringing Samsung 64K and 256K DRAMs contributed to the substantial injury suffered by the domestic industry during 1986. 187/

TENDENCY TO SUBSTANTIALLY INJURE

The Commission in its determination of tendency to substantially injure the domestic industry considers such factors as substantial foreign manufacturing capacity combined with the intention to penetrate the U.S. market. 188/ The Federal Circuit has declined to specify a legal standard regarding what is required to establish a tendency to substantially injure,

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187/ To the extent not inconsistent with the foregoing discussion, we adopt the ALJ's findings of fact concerning substantial injury.

188/ See, e.g. Certain Methods for Extruding Plastic Tubing, supra.

but has rejected the standard that unfair methods or acts that result in even "conceivable losses of sales" establish a tendency to substantially injure the domestic industry. [189]

The ALJ concluded that infringing Samsung imports have the tendency to substantially injure the domestic industry. It is clear that Samsung has enjoyed a fair degree of success in the U.S. DRAM market, and is seeking to increase its presence in that market, [ ] The evidence of Samsung's [ ] production capacity, as well as its demonstrated ability and intent to penetrate the U.S. market, support an affirmative determination with respect to tendency to substantially injure the domestic industry.

If Samsung does indeed cease production of 64K DRAMs, as it claims it plans to do, [190] the possibility exists that it can shift that production capacity to 256K or [ ] DRAMs, [191] which represent the growing sectors of the market. Samsung has an established sales and marketing system in the United States, and seeks to increase its market presence, in part by qualifying its product with major customers. [192] In addition, the pricing of Samsung's imported DRAMs is not restricted by the Fair Market Value (FMV) prices established for Japanese producers by the U.S./Japanese Semiconductor Agreement. This fact, in light of the [ ] unit values of Samsung's DRAMs during 1985 and 1986, supports the likelihood that the prices of Samsung DRAMs will continue to be at the [ ] of the market, exerting a [ ] pressure on domestic prices despite the FMV pricing of Japanese imports. These factors support the conclusion that infringing Samsung imports have the tendency to injure the domestic industry. 193/

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[189] Corning Glass Works, *supra*, at 1568.

[190] Tr. at 16,168-69.

[191] There are as yet no imports of Samsung [ ] DRAMs, so there is no finding as to infringement by these potential imports. Consequently, we have not considered them in our analysis of tendency to substantially injure.

[192] Tr. at 16,170, TI Exs. 4210 at 4, 4236, 4267, 4268, 4292 at 15-16, 4292b.

193/ To the extent not inconsistent with the foregoing discussion, we adopt the ALJ's findings of fact concerning tendency to substantially injure.

Exh. 15

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Isaac Fleischmann
Falls Church, VA

November 9, 1987

The Honorable Patrick J. Leahy
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

I am writing concerning the hearing you chaired on November 3, 1987 on the nomination of Susan W. Liebeler to be a judge on the U.S. Court of Appeals for the Federal Circuit.

Intellectual Property Owners Inc. (IPO) expresses no opinion on whether Ms. Liebeler is qualified for the position for which she has been nominated. The sole purpose of this letter is to comment on pages 13-16 of the prepared statement of David O. Elliott, who testified on behalf of the Customs and International Trade Bar Association.

Pages 13 to 16 of Mr. Elliott's statement are directed to cases under section 337 of the Tariff Act of 1930. Because of the interest of IPO's members in pending legislation to eliminate section 337's requirement for a showing of injury in intellectual property cases, we have followed section 337 rulings rather closely.

Mr. Elliott's statement quotes from opinions of the ITC and the Court of Appeals for the Federal Circuit and concludes as follows:

> Mrs. Liebeler's opinions in this area indicate that she does not acknowledge the supremacy of the statute and court decisions over her private views when called upon to perform her public duty as a Commissioner.

I believe the opinions quoted in Mr. Elliott's statement do not support the conclusion drawn.

The first opinion quoted, on page. 13, is taken from Mrs. Liebeler's 1985 dissenting opinion in In the Matter of Certain Optical Waveguide Fibers, and reads as follows:

> Importation of a product which infringes a valid patent will always affect the patent holder adversely . . . The Commission should, therefore, employ its most lenient injury test in Section 337 patent cases.

> There is no reason why the Commission's standards in Section 337 cases should differ significantly from those used by district courts in intellectual property cases. In that forum there is strict liability for patent infringement; infringement alone justifies an injunction . . . The construction of elaborate and strict injury tests is neither contemplated by the statute, nor does it serve any public purpose.

This quotation does not say the statute requires no showing of injury in patent cases. Mr. Elliott's statement leaves out Mrs. Liebeler's footnote number 3, which is appended to the second sentence of the above quotation in her original opinion. Footnote number 3 reads as follows:

> 3. "Both this court and the ITC have acknowledged that the quantum of proof of injury is less in the context of patent, trademark, or copyright infringement ... than in other types of unfair trade practices, because the holder of the former type of rights is entitled to exclude competitors entirely from using the intellectual property covered by those rights." Textron Inc. v. USITC, 753 F.2d 1019, 1029 (Fed. Cir. 1985).

In view of footnote 3, as well as detailed discussion elsewhere in Mrs. Liebeler's dissenting opinion, which is 13 pages in length, it is inaccurate to say that she rejected the Commission's obligation to make the statutory injury determination.

On page 14 Mr. Elliott quotes the Federal Circuit's 1985 opinion in Textron. He cites this case and the next one as evidence of Mrs. Liebeler's "apparent unwillingness to put aside her personal beliefs where a court has ruled against her position ...." As explained above, Mrs. Liebeler acknowledged the rule of Textron in her opinion in Optical Waveguide Fibers.

The Court of Appeals for the Federal Circuit has confirmed her interpretation of Textron in the very recent Fischer and Porter case, where it stated that the holder of an intellectual property right has a smaller quantum of proof of injury than would be required in a non-intellectual property-based case under section 337. Fischer & Porter Co., Inc. v. U.S. Int'l Trade Commission, decided October 28, 1987, No. 87-1166, slip opinion at page 6, citing Textron, 753 F.2d 1019, at 1029, 224 USPQ 625, 632, and Bally/Midway Mfg. v. U.S. Int'l Trade Comm'n, 714 F.2d 1117, 1124, 219 USPQ 97, 102 (Fed. Cir. 1983).

The next case quoted, at the bottom of page 14, is Mrs. Liebeler's opinion in In the Matter of Woodworking Machines. While her opinion in that case does not say what kind of injury test she would follow, it is important to note that Mr. Elliott is incorrect in assuming Woodworking Machines was written in 1987.

The Woodworking Machines determination was reached by the ITC in 1985, but publication was delayed until 1987, after the Commission had adjudicated a motion to modify the Commission's final action in the investigation and a petition for reconsideration of the Commissioners' final opinions. See explanatory note preceding table of contents in USITC publication no. 1979. In 1985 the ITC did not have the benefit of the more recent cases of the Federal Circuit interpreting section 337.

The final opinion involving section 337 quoted in Mr. Elliott's statement, on page 15, is by the Federal Circuit in Corning Glass Works in 1986. That opinion makes clear that section 337 requires the establishment of more than patent infringement alone to make the required showing of injury. However, Mrs. Liebeler's dissent at the Commission level, referred to at the top of page 16 of Mr. Elliott's statement, is not to the contrary. Her opinion is directed in substantial part to the issue of whether the sales in the United States of the infringing waveguide fibers, although small, posed a real threat to Corning Glass Works. The first part of her statement, while advocating a lenient injury test for patent cases, acknowledges the Textron interpretation that injury is required.

In summary, it cannot be concluded from the opinions discussed that Mrs. Liebeler has acted in disregard the statute or court interpretations of it.

I hope the Committee finds this analysis useful.

Sincerely,

Herbert C. Wamsley
Executive Director

cc: Hon. Susan W. Liebeler
David O. Elliott, Esq.

HCW/dd

ANSWERS OF SUSAN LIEBELER
TO QUESTIONS OF SENATOR LEAHY
NOVEMBER 17, 1987

QUESTION FOR MS. LIEBELER RE PREDATION

Your decision in the Red Raspberries case includes the following passages:

> The focus of the causation analysis must be on whether the material injury suffered by a domestic injury is by reason of price discrimination. . . .
>
> Price discrimination can take several forms. The fact that Congress referred to unfair price discrimination suggests to believe (sic) that Congress meant some type of predatory pricing. Predatory pricing is a form of strategic behavior in which a firm lowers the price of its product below the marginal cost of production. . . .
>
> Ideally, the Commission would develop data on the cost of production of the foreign firms accused of dumping. Unfortunately, cost data is difficult to develop, even in domestic antitrust cases. In the absence of such information, the Commission must look to relevant proxies. I believe that market share and pricing trends are the appropriate subjects for examination. Although this information is not dispositive of the predation issue, large and growing market share and deteriorating price trends are necessary conditions for a predatory behavior.
>
> As noted above, price discrimination cannot be effective in the absence of market power. Market share provides a first indication as to whether a firm has market power. Moreover, as a firm is attempting to drive out its rivals, one would expect to see prices decline as domestic firms attempt

> to survive. Because a direct inquiry into the intent of a foreign producer would be difficult at best, volume and price data provide useful proxies.
>
> This determination must be made on a case-by-case basis. The stronger the evidence of the following, however, the more likely that an affirmative determination will be made: (1) large and increasing market share, (2) high dumping margins, (3) homogeneous products, (4) declining prices and (5) barriers to entry to other foreign producers (low elasticity of supply of other imports).

Pages 14-16 (emphasis in original, footnotes omitted).

1. Do you believe that Congress meant that "some form of predatory pricing" is required to establish price discrimination as an element of causation in dumping and countervailing duty cases?

No. I do not believe that predatory pricing is required to establish price discrimination as an element of causation in dumping or countervailing duty cases. I have not required predatory pricing as a condition of relief in such cases. Indeed, I have never seen predatory pricing in any case before me at the Commission, but have nevertheless voted often to find causation in dumping and countervailing duty cases.

I do believe, however, as stated in *Red Raspberries*, that the dumping and countervailing duty laws were meant to prevent unfair price discrimination. Confusion may arise because such price discrimination has some elements in common with predatory pricing, although much more must be shown to establish the latter than the former. Underlying these trade laws were fears that foreigners (perhaps particularly those able to operate behind a protective wall of import restrictions and government subsidies) would be able to sell cheaply in America, absorbing losses here from profits at home. While their eventual goal would presumably be monopoly in American markets, Congress did not require that such result be probable before relief would be granted under the trade laws. Such a showing would be necessary, however, to establish predatory pricing under the antitrust laws.

To put the matter another way, the five factors referred to in you question would often be sufficient conditions for unfair price discrimination, but would never be sufficient by themselves to show predatory pricing. Additional factors--like probable success in obtaining monopoly power and retaining it long enough to recoup previous losses (as well as other factors)--would be necessary to show predatory pricing. Those factors are not necessary for unfair price discrimination.

Even though predatory pricing and unfair price discrimination are different, they are often discussed together in connection with the dumping laws. As Senator Heinz recently said on the Senate floor:

> "The purpose of the antidumping law is to remedy price discrimination across international boundaries made possible or 'financed' by higher prices in the home market. The economic theory underlying this law is that price discrimination -- particularly predatory price discrimination -- will drive out competition and lead to high monopolistic or oligopolistic pricing by the successful foreign exporter(s). Congress sought to remedy this economic evil by regulating market behavior so as to eliminate the unfair pricing."

Cong. Rec., Feb. 3, 1987 at S 1599 (statement of Senator John Heinz). See, also Trade Reform Act of 1974, S. Rep 1298, 93rd Cong. 2d Sess 179: "The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry." In addition, 19 U.S.C. §1677(7)(C)(ii) instructs the Commission that, in evaluating the effects of imports on prices the Commission shall consider whether "there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States." (Emphasis added). Price undercutting is like predatory behavior---it suggests that a seller is failing to maximize current profits by charging less for his product than he could have. Presumably, one would only do so if he could gain some future advantage like the advantage that is sought to be obtained from predatory pricing.

The conduct addressed by the antidumping laws is price discrimination which is something similar to predatory behavior. In Red Raspberries I talked about the importance of significant market share and deteriorating domestic price trends as a necessary condition for predatory behavior. These two factors are necessary, but not sufficient factors for predatory pricing under the antitrust laws. They may, however, depending on the product, be sufficient for an affirmative determination under the antidumping or countervailing duty laws.

I agree that the purpose of these laws is to prevent unfair price discrimination in the U.S. market by foreign firms. In enacting these laws, however, Congress has chosen to address not just predatory pricing, but all price discrimination that causes or threatens material injury to a domestic industry. That I have found that foreign imports are the cause of material injury to American industries in cases where there has been no predatory pricing suggests that I am aware of this distinction. A list of such cases is set forth in Exhibit 13 of my Additional Submissions to the Record.

2. In the context of causation in dumping and countervailing duty cases, what is "the predation issue" as to which "market share and pricing trends are the appropriate subjects for examination"?

"The predation issue" is the overriding issue of predatory pricing which I discussed in an attempt to provide a context for understanding Congress' concern with unfair pricing discrimination. As I stated in answer to Question No. 1, predatory pricing and unfair price discrimination are based in part on identical factors. The factors sufficient to show unfair price discrimination, however, are not sufficient to show predatory pricing, even though they are common to both phenomenon. Thus, large and increasing market share and declining prices will ordinarily be associated both with unfair price discrimination and with predatory pricing. My opinion in Red Raspberries specifically states that large and growing market share and deteriorating price trends "are not dispositive of the predation issue". Indeed, none of the five factors which I listed in that opinion can ever be dispositive of the predation issue. They may, however, be dispositive of the unfair price discrimination issue.

The language in my opinion tries to provide an economic rationale or explanation (in terms of its relation to predatory pricing) for concern about unfair price discrimination. It does not require a showing of predatory pricing before causation can be found.

3. What is the relevance of "the intent of a foreign producer" to the causation issue in dumping and countervailing duty cases?

None. Intent is relevant in an antitrust predatory pricing case; it is not relevant in a dumping or countervailing duty case.

4. The last quoted paragraph cites five factors as relevant to "this determination." To what "determination" does the paragraph refer?

The paragraph refers to the causation determination. The five factors relate to the question whether price discrimination in a particular case caused or threatened material injury to the relevant domestic industry.

Your opinion in Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela contains the following passage:

> . . .[I]f the factual setting in which the LTFV or subsidized sales take place do (sic) not support any rational self-serving goal to be served by predatory pricing, it is reasonable to conclude that such sales must be credited to one of the three benign explanations, and injury to the industry should not be treated as being "by reason of" such imports.

5. Please explain the difference between a "factual setting" that would demonstrate the existence of "predatory pricing," and a "factual setting [which] support[s] [some] rational self-serving goal to be served by predatory pricing". Please give examples of some facts which would be present in the second situation but not in the first.

A factual setting "that would demonstrate the existence of 'predatory pricing'" would include:

1. A firm (the "predator") charging prices below some relevant costs. Most economists would specify marginal costs, but the relevant costs have not been adopted uniformly by the courts. Other possibilities would include average variable costs or average total costs;
2. A relevant market which the predator is monopolizing or attempting to monopolize;
3. A dangerous probability of successful monopolization of that market;
4. The predator must have the ability to raise prices high enough after it becomes a monopolist and to keep them there long enough at least to recoup its predatory losses. There must be high barriers to entry;
5. In private cases at least, plaintiff must also show antitrust injury.

None of the five factors listed above would necessarily be present in the second situation. In a dumping case, sales do not have to be below cost, the seller does not have to have monopoly power, no probability of obtaining and keeping monopoly power need by shown and there need be no showing of the ability to raise prices to supra competitive levels.

There are factual settings that satisfy my five factor causation analysis that would not amount to predatory pricing. Assume, for example, there is a domestic industry that is materially injured; also assume there is a foreign competitor with a protected home market (thus the dumping) and an absolute advantage in production. This foreign firm is selling its product in the U.S. In this factual setting there would be high and increasing market share, a high dumping margin, possibly homogeneous products, declining U.S. prices and barriers to entry. Thus, I would find that the unfair price discrimination had caused or threatened material injury to the domestic industry. However, these facts would not demonstrate predatory pricing under the antitrust laws.

Confusion may arise because price discrimination bears some similarity to predatory pricing and perhaps I could have explained the distinctions more clearly in my early opinions. What I meant by a "factual setting" [which] supports [some] rational self-serving goal to be served by predatory pricing" is much less than the factors described above. I used this phrase as a way to think about inferences to be drawn from the evidence in the record. I meant a factual setting that would not support a predation story even after the facts had been stretched to the breaking point and beyond in favor of the predation hypothesis.

In order to understand the language quoted from my opinion, it must be noted that I was not discussing substantive legal standards. I was, rather, attempting to determine the weight to be given to some of the evidence on prices that had been gathered by the Commission staff in an investigation and then reported to the Commission.

The Commission usually only gets evidence of nominal prices, with little or no explanation of the terms of sale. Such price information is not very useful in determining what effect dumped or subsidized goods are having on the market. For example, a television set with a warranty usually sells for more than a television set without one. If all we are told is that TV set #1 sold for $200 and TV set #2 sold for $190, we really don't have enough information to decide what accounts for the difference in price.

As the quoted passage mentions, there are three benign explanations for such a difference. There could be a difference between the sets in terms of quality, there could just be ignorance on the part of sellers as to how much they could charge, or the person the staff spoke with could have gotten the information wrong. As I have explained in other opinions, all these possibilities reduce the value of the individual transaction prices the staff gathers. Aggregate price trends of a great many sales are more useful.

I included the quoted passage in my opinion to conclude a three-page discussion of those benign possibilities and to suggest that those possibilities were the likely explanations for differences in price if, there is no way that the foreign firm can benefit from the "undercutting." I mentioned predatory pricing not because it is a substantive requirement under the trade laws but because it provides a context within which to assess the inferences to be drawn from other "facts." If there is no conceivable way that a foreign firm can benefit from "underselling," the market, the benign explanations become more plausible than would otherwise be the case.

Following the discussion from which the quotation is taken, I returned to the main theme of the opinion: my conclusion that dumped or subsidized goods that supply a tiny share of the market do not significantly affect market price (absent conditions of demand and supply inelasticity). And, if such goods do not significantly affect market price, they cannot harm American industry. As I put it in the very last sentence of that opinion, "[h]ad these imports from Thailand and Venezuela not entered the American market at subsidized and less than fair market value prices, the domestic industry would not be materially better off than it is now." Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela, Inv. No. 701-TA-242 (Preliminary), 731-TA-252-253 (Preliminary), USITC Pub. No. 1680 at 30 (1985).

QUESTIONS FOR MS. LIEBELER ON RELIEF IN ESCAPE CLAUSE CASES

In your 1983 confirmation hearings before the Finance Committee, you responded as follows to a written question from Senator Dole:

> It is my understanding that it is the custom of most Commissioners not to participate in relief recommendations in those cases in which they have made a negative injury determination and their likely recommendation would be for no relief. This custom appears to be reasonable.

Have you followed this custom in your tenure on the International Trade Commission? If not, have you concluded that this custom is not reasonable? Please explain.

Of the eleven escape clause investigations conducted during my tenure on the Commission, the Commission found that increased imports caused or threatened serious injury in only four cases. I voted with the majority in two of those cases, Unwrought Copper, Inv. No. 201-TA-52, USITC Pub. No. 1549 (1984) and Nonrubber Footwear, Inv. No. 201-TA-55, USITC Pub. No. 1717 (1985). In the remaining two cases, Carbon and Certain Alloy Steel Products, 201-TA-51, USITC Pub. No. 1553 (1984) and Wood Shakes and Shingles, Inv. No. 201-TA-56, USITC Pub. No.1826 (1986), I found serious injury but did not find that increased imports were a substantial cause of the injury. I participated in the relief phase in these two cases as did other Commissioners who found that increased imports were not a "substantial cause" of serious injury.

I have, therefore, never faced the issue of whether I would participate in a remedy recommendation after finding that the domestic industry had not been seriously injured or threatened with serious injury.

As I stated in 1983, in response to a question from Senator Heinz, I believe that it is reasonable for a Commissioner to decline further participation in a case when that Commissioner has made a negative injury determination and is likely to recommend no relief. On the other hand, I believe it is also reasonable for Commissioners who make negative injury findings to participate in relief recommendations; the statute appears to contemplate their participation:

> The *Commission* shall report to the President its findings . . . . If the *Commission* finds . . . the serious injury or threat thereof described in subsection (b) of this section, it shall--

19 U.S.C. §2251(d)(1) (emphasis added).

In 1984, the domestic steel industry filed a massive "escape clause petition," claiming that it had been seriously injured by legal steel imports, and asking the Commission to recommend to the President some relief. Your view -- a minority view on the Commission -- was that the industry had been injured, but not by increased imports, so you voted to deny the petition. You then went on to participate in the relief recommendation phase of the case.

You stated at the Commission meeting on this petition that you were not convinced that any relief under the trade laws would help the steel industry, so you recommended no relief.

You went on to say that if any of your fellow Commissioners recommended import relief, and if the President followed their advice, "then I recommend that the President condition such relief on a 20 percent compensation cut by steelworkers....a 20 percent compensation concession by labor would result in a huge social welfare gain which would more than offset any negative effects of a quota or tariff....I carefully considered other possible conditions, including concessions by management, guarantees of specific new investment by the industry, and the linking of import relief to productivity gains. In my view, each of these conditions could be counterproductive and cause serious injury to the steel industry. Therefore, I have not made any gesture of evenhandedness by including such conditions in my proposal."

Why did you participate in the relief phase of the steel escape clause petition, after you had determined that the industry was not entitled to any relief?

The Commission often bifurcates its escape clause investigations, holding separate hearings and having separate votes on injury and remedy. This occurred in Carbon Steel. Separate hearings were held--the injury hearings were held on May 9-12, 1984, and the remedy hearings on June 21 and 22, 1984.

Subsequent to the injury hearing on June 12, 1984, I joined a majority of the Commission in making a negative determination for four of the domestic industries involved in the case. For the remaining five industries, the majority made an affirmative determination (that increased imports were the cause of serious injury to the industry). While I found serious injury to each of these five industries, I found that a decrease in demand or a decrease in domestic supply was a greater cause of injury than increased imports.

Therefore, under 19 U.S.C. §2251(b)(4), I was required to find that increased imports were not a substantial cause of the serious injury.

I did not come to the determination that there was no relief that I could recommend under the trade laws to prevent or remedy the serious injury to the industries until the conclusion of the relief phase of the proceeding. The quoted remarks were made at the July 11, 1984 Commission meeting when the Commission announced its remedy recommendations.

Do you recall why you thought that it would cause "serious injury to the steel industry" if steel executives were required to take the same pay cut that you recommended for labor?

As a general rule mandatory paycuts for workers or management might injure any industry, because both workers and managers may move to jobs in other industries. There was no information in the record suggesting that steel executives were being paid more than their opportunity costs (i.e., what they could earn at other jobs.) Thus, pay cuts for steel executives could result in these executives quitting their jobs, thereby leaving the industry without competent management.

There was, however, considerable evidence in the record suggesting that pay cuts to hourly workers would not result in depriving the industry of trained employees. Over the previous twenty years, steelworkers had become the most highly compensated workers in the United States. As wages were raised, employment was cut back. In 1983, the President of Bethlehem Steel wrote that the most damaging factor in the decline of the steel industry had been non-competitive employment costs which accounted for close to one-half of the costs of doing business. (Carbon Steel at 162-163 (Injury and Remedy Views of Vice Chairman Susan Liebeler).

According to the testimony of the President of the Steelworkers Union, there were 200,000 unemployed steel workers, including 100,000 on layoff and another 100,000 who had lost their jobs and had no realistic prospects of reemployment in the steel industry. In addition, because of the time lag involved as machinery is substituted for labor, more workers might be laid off. These unemployed steel workers would be willing to return to work at lower wages. Carbon Steel. Id..

Because temporary import relief is supposed to prevent or remedy serious injury to the domestic industry and enable the industry to compete effectively with imports at the end of the period of temporary relief, I advised the President that, if he imposed import relief, it should be conditioned on a twenty percent cut in compensation for steelworkers. I noted that such a cut would result in employment of at least 25,000 workers who would not otherwise be employed and help ensure the competitiveness of the U.S. Steel Industry.

You made another point in your decision in this case, which you also raised in the Nonrubber Footwear escape clause case, brought by the shoe industry. The argument was made in both those cases that import relief would make these ailing industries more attractive to investors, who could provide the capital needed to modernize production. In the shoe case, you wrote that this argument "reflects a fundamental misunderstanding of the way in which capital markets operate." You said in the steel case that "new investment, if it is sound, will take place with or without the erection of additional import barriers."

Have you ever voted for import relief in an escape clause case to help ailing industries improve their cash flow and thereby encourage further investment? Please provide the Committee with copies of any cases in which you voted for import relief on this or a related rationale.

I have not voted for import relief in an escape clause case to help ailing industries improve their cash flow and encourage further investment. The statute permits a Commissioner to recommend import relief only if it would prevent or remedy the serious injury. 19 U.S.C. §2251(d)(1)(A). I could not recommend such relief merely to increase a domestic industry's cash flow.

As I stated in Carbon Steel (Injury and Remedy Views of Vice Chairman Liebeler at 162) Commissioners of the ITC do not have the appropriate expertise, incentive or power to restructure an industry. I do not think it is appropriate for a Commissioner to encourage or discourage any particular investment or to condition import relief on the reinvestment of additional cash flow in the industry. These decisions should be made by managers, stockholders, bondholders and other creditors of the firms, not the government.

The statute provides that import relief should be an element that the International Trade Commission should consider recommending to the President in escape clause cases. In your view, as a general matter, under what circumstances should the Commission include import relief in its recommendations?

Commissioners should only recommend import relief in an escape clause case when the statutory requirements for recommending it have been met. The statute says that import relief is to be granted to prevent or remedy the serious injury. The statute does not permit the Commission to recommend adjustment assistance and import relief and the Commission must recommend adjustment assistance if it determines that adjustment assistance can effectively remedy the injury. 19 U.S.C. §2251(d)(1)(B). Since the import relief the Commission can recommend is temporary in nature, *see* 19 U.S.C. §2253, I would recommend it only when temporary relief would remedy or prevent serious injury to the domestic industry.

QUESTIONS FOR MS. LIEBELER ON SEC. 337 INJURY TEST

Your opinion in the case of In re Certain Aramid Fibers, issued November 26, 1985 includes the following passage:

> ...[S]several Commissioners do not recognize the importation of an infringing item as necessarily injurious to the domestic industry (assuming that a domestic industry exists for the purpose of section 337). In order to establish substantial injury, they require a significant market share be held by the infringing imports.

Page 6 (footnote omitted).

At the time you wrote your decision in this case, was it your view that importation of an infringing item established injury within the meaning of section 337? If not, please explain your criticism of the position of the other commissioners, as you characterized it in this opinion.

It was not my view that importation of any infringing item established injury under section 337. The quotation is taken from a section of my opinion addressed to the issue of whether downstream products containing the infringing product must pass a separate injury test if they are to be covered by an exclusion order. I dissented from the majority's remedy recommendation because the majority excluded only infringing imports of aramid fiber and not downstream products including the infringing fiber. The majority stated that "For the Commission to issue an exclusion order complainant must establish that each of the products to be excluded, individually or collectively, can have the effect or tendency to substantially injure or destroy the domestic industry....

The Commission finds that complainant has not established that imports of articles fabricated from basic forms of aramid fiber will have the effect or tendency to substantially injure or destroy the domestic industry." Aramid Fiber, Inv. No. 337-TA-194, USITC Pub. No. 1824 at 11-12 (1986). My point was that given the stringent injury test embraced by the majority, disaggregation of infringing imports containing infringing fiber along with the application of a separate injury test to them for purposes of the remedy determinations, would make it possible for massive imports of infringing items to escape exclusion once a violation had been found. Id. at 6-7 (Additional and Dissenting View of Vice Chairman Liebeler).

Aramid Fiber involved infringment of a domestic process patent. The Federal Circuit has stated that where the unfair practice is the infringement of a copyright, trademark or patent right, even a small loss of sales may establish the requisite injury to the domestic industry under section 337. See, e.g., Bally/Midway Mfg. Co. v. U.S., 714 F. 2d 1117, 1124 (Fed Cir 1983). This statement was repeated again in Textron Inc. v. U.S., 753 F. 2d 1019, 1028 (Fed. Cir. 1985) where the court explained that this did not mean that there was no injury requirement in the statute. In its most recent statement the Federal Circuit cited Bally/Midway and Textron with approval stating "the holder of an intellectual property right has a smaller quantum of proof of injury than would be required in a nonintellectual property-based case." Fischer & Porter Co., Inc. v. U.S., No. 87-1166, slip opinion at 6 (Oct. 28, 1987).

In any event, as explained in my dissent in Aramid Fiber,, I believed that sales of articles containing infringing aramid fiber would in fact injure the domestic industry "because sales of finished goods made from aramid fiber reduce the demand for aramid fiber produced by DuPont" and "because DuPont could have licensed the foreign manufacturer" and thereby obtained royalties from the sale of such fiber. Aramid Fiber, Inv. No. 337-TA-194, USITC Pub. No. 1824 at 5 (1986) (Additional and Dissenting View of Vice Chairman Liebeler).

QUESTIONS FOR MS. LIEBELER ON CUMULATION DECISIONS

Some of your decisions on cumulation of dumped and subsidized imports have been controversial. In the case of Bingham and Taylor v. United States, the Court of International Trade held that the statute, "without exception," requires consideration of the cumulative impact of dumped and subsidized imports of the same product. You have taken a contrary position when the case was before the International Trade Commission.

Mr. Jameson, in his article in Law and Policy in International Business, wrote:

> One Commissioner, for example, routinely presents the same reasons for declining to cross-cumulate that she presented previously, and notes that since the Commission has decided to appeal Bingham & Taylor, she will not follow the opinion.

Mr. Jameson cites for this proposition your opinion in the 1986 case of oil country tubular goods from canada and Taiwan. Is this an accurate description of your position on cross-cumulation after the Court of International Trade's decision in Bingham & Taylor and before the Federal circuit issued its decision in that case?

The CIT decided Bingham & Taylor on February 14, 1986 and entered a judgment remanding the Commission's determination and requiring the Commission to cross-cumulate. On remand, I followed the court's instructions and joined the Commission in its affirmative determination. A copy of the Commission's determination on remand is attached as Exhibit A. [IN COMMITTEE FILES]

The Federal Circuit decided Bingham & Taylor on March 31, 1987. During the thirteen month period between the CIT and Federal Circuit decision, I cross-cumulated in only one other case, as described below. In all other cases where the issue of cross-cumulation arose during this period, I stated that the Commission had decided to appeal Bingham & Taylor and until the issue was resolved on appeal I would not cumulate across statutes because I believed the statutes precluded cross-cumulation. I generally referred to a complete discussion of my views on cross-cumulation as set forth in Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela,, Inv. Nos. 701-TA-225,234 (Preliminary) and 731-TA-217, 219, 221-226, and 228-235 (Preliminary), USITC Pub No. 1642, (1985) at 41-50 (Views of Vice Chairman Liebeler).

If so, please explain why you believe the Commission was not required to follow the interpretation of the statute decided upon by the court with jurisdiction to review its decisions in dumping and countervailing duty cases.

I refrained from cross-cumulating during this period on the advise of the General Counsel and on the advise of my Senior Counsel. Several Commissioners did not cross-cumulate during the period while the case was on appeal. See e.g. Brass Sheets and Strips, Inv. Nos. 701-TA-269 and 270 (Preliminary), USITC Pub. No. 1837 at 11, nn. 27-28 (1986) where three commissioners (Commissioners Stern, Brunsdale and Liebeler) did not cross-cumulate. A more complete discussion of when the Commission is bound by CIT opinions is set forth below.

If not, please state your position on cross-cumulation during this period and provide the Committee with copies of any opinions in which you followed the decision of the Court of International Trade on this issue.

As indicated above, I followed the instructions of the CIT on remand and joined the Commission in its remand decision in Bingham & Taylor. I also cross-cumulated in another case during this period, Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175 (Final), USITC Pub. No. 1967 (1987). The case had been filed before the effective dates of the 1984 amendments addressing cumulation and was not covered by them. The court held that even though cross-cumulation was not mandatory prior to the 1984 Act, it was not forbidden. The court found that a majority of the commissioners failed to cross-cumulate for reasons that were contrary to law and remanded the case to the Commission for further consideration. Although the CIT did not order the Commission to cross-cumulate, I cross-cumulated on remand. In my opinion I noted that the cross-cumulation issue was currently on appeal and that the result of cross-cumulation was not outcome determinative in this case. A copy of my opinion in this case is attached as Exhibit B. [IN COMMITTEE FILES]

In other cases decided during this period, I did not cross-cumulate. It was my custom to state that the Commission has voted to appeal Bingham & Taylor and until the issue was resolved by the Federal Circuit, I would continue not cumulating across statutes because I believed that the statutes precluded cross-cumulation. I frequently set forth the reasons why I believed cross-cumulation was not permissable: 1) Dumping and subsidy cases are governed by two separate sections of the law, suggesting that Congress intended to treat the two separately; 2) Historical ITC practice had been not to cross-cumulate and Congress could have chosen to alter the practice by specifically addressing it in the 1984 Act and had not done so; 3) The language of the countervailing duty law clearly requires that the injury be by reason of subsidized imports, not subsidized and dumped imports. Similarly the language of the antidumping statute requires that the injury be "by reason of such imports." For a full explanation of why I believed cross-cumulation was not permitted under the statutes, see Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela, Inv. Nos. 701-TA-225-234 (Preliminary); 731-TA-213-217, 219, 221-226, and 228-235 (Preliminary), USITC Pub. No 1642 (1985). A copy of the section of my opinion addressing cumulation is attached. as Exhibit C. [IN COMMITTEE FILES]

Recently, the Court of Appeals for the Federal Circuit affirmed the decision of the Court of International Trade in Bingham & Taylor. Have you had occasion to rule on any cases involving cross-cumulation issues since the Federal Circuit issued its opinion? If so, please provide them to the Committee. If not, please state whether you believe the Commission is required to follow the Federal Circuit precedent on interpretation of the statute on this question. If not, why not?

Yes, since Bingham & Taylor was decided by the Federal Circuit, I have addressed cross-cumulation in three cases and followed the decision of the Federal Circuit: Forged Steel Crankshafts from the Federal Republic of Germany and the United Kingdom, Inv. Nos. 731-TA-351 & 353 (Final), USITC Pub No. 2014 (Sept. 1987), Industrial Phosphoric Acid from Belgium and Israel, Inv. Nos. 701-TA-286 and 731-TA-365 & 366 (Final), USITC Pub. NO. 2000 (Aug. 1987); and Granite from Italy and Spain, Inv. Nos. 701-TA-288 & 289, and 731-TA-381 & 382, (Preliminary) USITC Pub. No. 2016 (Sept. 1987). In each of these cases I cross-cumulated. Copies of these Commission opinions are attached as Exhibit D. [IN COMMITTEE FILES]

As a general matter, what is your view on whether the Commission is bound by precedents of the Court of International Trade in cases before the Commission that are subject to review by that court? What is your view on whether the Commission is bound by precedents of the Federal Circuit in cases before the Commission that are subject to review by that court?

The Commission is bound by the holding of the Federal Circuit, subject to the usual rules of stay of enforcement pending petition for certiorari.

When a case is remanded to the Commission from the Court of International Trade (CIT), I must and do follow the remand instructions from the court in that case. The Commission cannot appeal from the remand order because it is not a final order for purposes of appeal. Cabot Corp v. U.S., Appeal No. 86-729 (Fed. Cir. April 9, 1986). Thus, the Commission will issue a new opinion on remand, and at that point appeal from the CIT's remand order. Until the appellate process has been exhausted, the CIT's ruling is not binding on the Commission in other cases.

If the Commission were to follow the CIT's rulings in other cases during the appeal period, the Commission would lose its rights to appeal each of these cases. Thus it is not uncommon for the Commission not to adhere to a ruling of the CIT in other cases until that issue has been addressed by the Federal Circuit.

For example, in 1984 the CIT decided Republic Steel Corp v. U.S., 591 F. Supp. 640 (1984) reh'g denied (Mar 11, 1985), dismissed Aug. 13, 1985, holding that the Commission was not applying the proper criteria in its preliminary determinations. The court held that the ITC was not authorized to weigh conflicting evidence in preliminary determinations in applying the "reasonable indication" of material injury or threat of material injury standard under 19 U.S.C. §1673.

The Commission was unable to get prompt review and did not want to restructure its preliminary investigatory procedures until the issue had been resolved by the Federal Circuit. The Commission did not follow Republic Steel and sought to have the issue addressed by the Federal Circuit. It was difficult to obtain review because remand orders are not final and the Commission was unable to obtain an interlocutory appeal.

There followed a series of cases where the Commission reached preliminary negative determinations and the CIT applied the ruling of Republic Steel. In each one the Commission did not follow and contested the ruling of Republic Steel. It was not until 1986 in American Lamb Co. v. U.S., 785 F. 2d 994 (Fed Cir 1986) that the Federal Circuit addressed the Republic Steel issue and reached a result contrary to that of the CIT.

Because of the difficulty of obtaining prompt judicial review, a CIT decision reversing Commission practice creates serious administrative problems for the Commission when the issue affects a large number of other investigations, such as the proper standard for preliminary investigations or cross-cumulation. This issue has been a subject of considerable commentary and was the subject of a panel discussion at a recent Judicial Conference of the Court of International Trade.

QUESTIONS FOR MS. LIEBELER ON LOYOLA LAW SCHOOL

You were a faculty member at Loyola Law School from 1973 to 1984. Were you a tenured member of the faculty? If so, when did you gain tenure?

Were you discharged from the Loyola faculty, or did you resign? Please explain in detail the circumstances under which you left the Loyola faculty.

At one point, you retained an attorney and considered filing a legal action against Loyola. In what respect did you feel that your treatment by the administration of Loyola Law School was illegal?

The circumstances under which I left Loyola Law School are as follows. I joined the Loyola Law School faculty in 1973 as an Acting Professor of Law and in 1978 I was granted tenure. I am no longer a member of the Loyola faculty.

I had been granted a sabbatical leave for the 1984-1985 school year. Instead of taking a paid sabbatical, I took a one year leave without pay during my first year of service on the Commission. In December 1984, I received a telephone call from Dean Frakt of the law school to discuss whether I would return to Loyola Law School in the fall of 1985. In that conversation, I indicated that I might like another one year leave of absence without pay and pointed out that during my tenure at Loyola I had not taken the sabbatical leaves to which I was entitled. The Dean indicated that he was reluctant to grant me a leave of absence for the entire school year, but that he could give me a leave until December 31, 1985. I told him that I would think the matter over and get back to him.

In my January 2, 1985 letter to Dean Frakt, a copy of which has previously been furnished the Committee, I followed up our telephone conversation. I noted that teaching and scholarship were very important to me and that I intended to bring the knowledge and experience I had gained as Vice Chairman of the ITC back to the classroom at Loyola. Because I felt that it was inconsistent with my obligation to the President to resign after such a short tenure on the Commission, I requested an additional one year leave of absence. In that letter I mentioned that a two year leave of absence is standard academic practice for appointments such as mine. In an effort to be accommodating and sensitive to the needs of the law school, I also offered to help locate a suitable person to teach in the corporate area during the 1985-1986 school years. I pointed out that I did not expect an indefinite leave of absence from Loyola and that if my plans should change so that I would not be returning to Loyola, I would so advise the law school by December 1985.

I was quite surprised to receive Dean Frakt's January 17, 1985 letter, a copy of which has previously been furnished the Committee, stating that unless I informed him by the end of the month that I intended to return to the Law School for the 1985-1986 school year, he would conclude that I had chosen to leave the Loyola Law School faculty.

I discussed Dean Frakt's letter with several members of the tenured faculty. I had talked with these colleagues the previous year about the situation of another senior tenured member. Dean Frakt had attempted to replace her without consulting the tenured faculty, and in apparent violation of her tenure rights. My colleagues were quite concerned about the unilateral decision of the Dean to terminate my tenure. They were also concerned that the law school administration had granted extended leaves of absence to certain faculty members and denied them to others.

I viewed Dean Frakt's position to be a possible violation of my rights as a tenured faculty member and I thought it important, as a matter of principle, to stand up for the rights of tenured members of the faculty. In my January 30, 1985, letter I informed Dean Frakt that I did not agree with most of the statements in his January 17 letter; that I was not resigning my tenure or my position on the Loyola faculty; and, that I intended to obtain counsel to handle this matter for me.

Lester Ostrov, Esq., represented me. By letter dated March 8, 1985, a copy of which I previously furnished the Committee, Mr. Ostrov contacted counsel for the law school, and advised him that the law school had not followed the procedures required to remove my tenure. He noted that the law school had not provided just cause for terminating my tenure in violation of due process procedures, my employment contract with the law school and the covenant of good faith and fair dealing. Mr. Ostrov requested that the law school rescind its action purportedly terminating my tenure.

My attorney had several conversations with counsel for Loyola. I had hoped that he would be able to work with counsel for Loyola and settle the matter on an amicable basis without sacrificing the important principles associated with academic tenure, but unfortunately this did not occur. Shortly before the statute of limitations ran on any claim I might have had against the law school, I spoke with Mr. Ostrov and told him that I was not willing to press suit against Loyola even though I believed that my tenure rights had been violated.

QUESTIONS FOR MS. LIEBELER CONCERNING VISIT TO GREEN MOUNTAIN ORCHARDS

On August 22, 1985, you visited Green Mountain orchards in Putney, Vermont, on official business of the International Trade Commission.

Please identify the official business of the ITC that was the subject of this travel.

Were any cases involving the import of apples or apple products pending before the Commission on August 22, 1985? Was any such case filed subsequent to that date? Please provide the title and docket number of the case or cases, and the date of filing, and of subsequent Commission action thereon.

Please state the official business purpose for which your confidential assistant accompanied you on the trip to the Green Mountain Orchards on August 22, 1985.

On August 22, 1985 I visited Green Mountain Orchards in Putney, Vermont where I inspected the orchards and apple facilities and met with the owner to discuss the conditions of competition and trade in the apple and apple juice business. As I noted in my August 6, 1987 testimony before the Committee, Commissioners of the ITC frequently make plant and industry visits to learn about conditions of trade. In order to keep themselves informed about the state of domestic industries and conditions of trade, it is common for Commissioners to visit industries that are not under investigation at the Commission.

Some Commissioners also make plant visits during open investigations and speak with parties to the investigation, sometimes with lawyers present representing only one party to the investigation. Because of my legal training, I have always been uncomfortable about making such plant visits, even though Commission rules do not prohibit ex parte communications in these types of investigations. (The Administrative Procedure Act does not apply to most types of Commission investigations.) Thus during a pending investigation, I generally do not visit facilities of petitioners or respondents unless the visit is noticed under the Sunshine Act and counsel for both sides are able to attend.

At the time I visited Green Mountain Orchards, there were no cases involving apples or apple products pending before the Commission. I was, however, aware that an escape clause case was about to be filed at the Commission concerning apple juice. My desire to educate myself about conditions in the industry prompted my August 22, 1985 visit to Green Mountain Orchards.

In order to avoid any possible misunderstandings about what was said during such visits, I generally do not visit plant facilities alone. Frequently, I am accompanied by a member of my personal staff, by another Commissioner, or by a member of the Commission staff. I take different people with me depending on the nature of the visit, the industry I am visiting and the staff assistance I may need on that trip.

When Myrna Allen was my confidential assistant, she also worked on certain Commission investigations. At the time we visited Green Mountain Orchards, I planned to have her work on the upcoming apple juice case. (Ms. Allen ultimately decided to leave the Commission in November, 1985 and did not work on the case.) I wanted her to be available to take notes and serve as an observer.

On December 27, 1985, at the request of the U.S. Trade Representative, the Commission instituted an investigation on imported apple juice, Inv. No. 201-TA-59, under Section 201(b) of the Trade Act of 1974, 19 U.S.C. §2251(b)(1). The Commission held public hearings on April 17, 1986, and on May 21, 1986 the Commission reached a negative determination. The Commission determined that increased imports of apple juice were not causing serious injury, or threat thereof, to the domestic industry producing apple juice. The Commission included growers, such as Green Mountain Orchards, as part of the domestic industry producing apple juice. The Commission's report was sent to the President on June 13, 1986.

QUESTIONS FOR MS. LIEBELER

It has been reported to the Committee by a former employee of the International Trade Commission that you made the following remark concerning a member of the Commission appointed by President Reagan:

> "He should remember who put him here. He was put here to follow my lead."

Do you recall making that statement or words to that effect? If so, please describe the circumstances and provide a complete explanation.

I do not recall making such a statement, and the statement makes little sense. The statement apparently refers to a male commissioner. However, it could not apply to either Commissioner Lodwick or Commissioner Eckes, who were already serving when I took office on April 20, 1984. Commissioner Eckes took office on September 21, 1981 and Commissioner Lodwick took office on August 12, 1983. The only other male Commissioner is Commissioner Rohr, but it clearly could not be applicable to him. Commissioner Rohr, a Democrat, took office on March 27, 1984 after serving many years as the staff director of the House Ways and Means Committee Subcommittee on Trade. He has never, to the best of my knowledge, claimed to be closely associated with the Reagan Administration.

The Committee has received numerous allegations concerning your temperament from persons who claim to have witnessed the following incidents. As to each incident, please state whether it occurred, and if so, please explain your behavior.

It has been reported to the Committee that, in December 1986, you entered a post office adjoining the ITC offices; that you demanded to be served at the head of a long line; and that when you were not able to seal your package because the sponge provided to you was dry, you stamped your foot, shouted some profane words, clearly audible to the other patrons, and stormed out.

It has also been reported to the Committee that, around Valentine's Day in 1987, you encountered another long line in a stationery store near the ITC offices. You demanded to be served at the head of the line, and when you were refused, you made some loud angry remarks, clearly audible to the other customers, and stormed out of the store.

I do not recall either of these incidents nor do I believe they occurred. I have, however, on occasion requested management to provide additional personnel to accommodate long lines when I believe that a facility is not being adequately responsive to its customers. Thus when I observe long lines in a store, I frequently request that the management open another cash register in order to provide better service.

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November 6, 1987

Ms. Rosemarie Schmidt
Editor-in-Chief
Law & Policy in International Business
25 E Street, N.W.
Washington, D.C. 20001

Dear Ms. Schmidt:

Thank you for forwarding to me the letter to LPIB by Mr. Nolan E. Clark, criticizing my article on the material injury standard. I had first heard about the letter from Mr. Clark on November 3, during the confirmation hearings of ITC Chairman Liebeler before the Senate Judiciary Committee. Chairman Liebeler has been nominated to the U.S. Court of Appeals for the Federal Circuit, and Senator Leahy was using the article as a basis for questions regarding Chairman Liebeler's view of the law. Ms. Liebeler indicated that letters from Mr. Clark and from a Professor McDermott (whose letter you have apparently not yet received) had been sent to LPIB attacking the scholarship of the article. She seemed to have the letters in hand.

When I called LPIB after the hearings, you had not yet received the letters, but you called me later that day to advise me that the letter from Mr. Clark had arrived in that day's mail. I find it interesting that, although my article was published last Spring, Mr. Clark did not send his letter until the day before Chairman Liebeler's confirmation hearing.

I have a few quick comments on the substance of his letter. Mr. Clark seems to believe that one is not allowed to disagree with court opinions in law review articles. Such criticism is, of course, the stuff of many an article. For instance, he criticizes me for arguing against a bifurcated injury analysis when the American Spring Wire case supports such an approach. On pages 528-29 of my article, I indicated that the American Spring Wire case supports a bifurcated analysis, while the Republic Steel case, issued the same day, supports a non-bifurcated analysis, and I said that "the author believes that the reasoning contained in Republic Steel more accurately represents congressional intent."

Mr. Clark finds it an "egregious example[ ] of poor scholarship and poor disclosure" that I argued against the use of margins analysis when the Hyundai Pipe case does not prohibit such an approach. That opinion was issued shortly before the article went to final printing, but I nevertheless included it in a footnote. I suppose I should have explicitly stated that I believe Hyundai was incorrectly decided, but judging from Mr. Clark's criticism of my handling of the American Spring Wire case, such a statement would not have mollified him.

Mr. Clark also finds fault with my analysis of Chairman Liebeler's "five factor test." I stand by my position (on page 522 of the article) that "not one of the five criteria is within the letter or the spirit of the law." One of the five factors is "declining prices," and Mr. Clark correctly notes that the statute directs the Commission to consider "the effect of imports of that merchandise on prices in the United States for like products." The statute, however, specifically does not require "declining prices" for an affirmative determination. An industry may choose to lose sales to dumped imports instead of lowering prices and still be injured, and prices may be rising, but not as fast as costs, causing price suppression. See my article, at 532-35, 545, 553, and 560-62.

Likewise, he says that the statute permits the Commission to consider "other factors," and that dumping margins can be one of those factors. As I discuss on pages 550-60 of my article, Chairman Liebeler requires for an affirmative determination that there be "high" dumping margins and that there be "declining" prices. Even if dumping margins are a relevant economic factor (which I believe they are not), "high" dumping margins (and Chairman Liebeler has considered margins as high as almost 25% to be "not large"--Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Italy and Yugoslavia, Inv. Nos. 731-TA-342 and 346 (Final), USITC Pub. 1999, Aug. 1987, at 63) should not be required for an affirmative determination.

Finally, Mr. Clark criticizes me for singling out Chairman Liebeler for refusing to follow Bingham & Taylor before the Court of Appeals for the Federal Circuit had ruled. I did note that a number of commissioners continued to decline to cross-cumulate, and said that one Commissioner, "for example," explicitly stated that she would not follow the case. Article, at 539. Chairman Liebeler's views were thus merely an example, but she was the one who most explicitly refused to follow the case.

In short, I do not believe that LPIB need be concerned that it had somehow managed to let an article with "poor scholarship" slip through. Mr. Clark's criticisms are not about my scholarship--he just does not like my conclusions, a view to which he is entitled.

Sincerely,

Paul W. Jameson

Paul W. Jameson

cc: Nolan Clark
Steve Metalitz, Senate Judiciary Committee

LOYOLA LAW SCHOOL

OFFICE of the DEAN

November 30, 1987

Andy Tartaglino, Staff Investigator
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Tartaglino,

Thank you for sending me a copy of Susan Liebeler's responses to questions concerning her departure from Loyola Law School.

Although the basic facts concerning Professor Liebeler's departure from the faculty are accurate as recited in her testimony, there are some points raised with which I would take issue.

The statement "I was quite surprised" at the bottom of page 30 is a surprise to me. I had made it very clear to Professor Liebeler that I was extremely reluctant to grant long-term leaves and that her suggestion that she might find a replacement for herself on a temporary basis was not acceptable.

On page 31 Professor Liebeler refers to an alleged attempt on my part to replace "another senior tenured member" of our faculty in apparent violation of her tenure rights.

I have no idea to what Professor Liebeler is referring to. Neither do two senior faculty members who I asked about it. Although there were discussions with one tenured faculty member concerning early retirement, these were initiated by the faculty member and ultimately did result in an agreement for early retirement. It is inconceivable to me that this would have been regarded by anyone as violating tenure rights. If Professor Liebeler is referring to anything else, I am at a loss.

Obviously, the Committee is not concerned with my relations with faculty members, but I do think that this statement is illustrative of a potential problem. Neither Professor Liebeler nor anyone else on our faculty has ever raised an issue similar to the one referred to in Professor Liebeler's testimony.

Professor Liebeler also states "my colleagues were quite

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concerned about the unilateral decision of the Dean to terminate my tenure." No one expressed such concern to me. Further, I did not make a unilateral decision to terminate Professor Liebeler's tenure. What I did tell her was that if she chose not to return to the faculty at the end of her leave she was in fact resigning.

Professor Liebeler also refers to faculty concerns that "the Law School administration had granted extended leaves of absence to certain faculty members and denied them to others." This is categorically untrue. No other professor has been granted a leave of absence by me for more than one year. One unfortunate faculty member had to be removed from class because of serious substance abuse problems. In order to avoid having to take action resulting in detenuring of this professor, he was put on an extended leave of absence at partial pay in order for him to seek treatment and recovery. This was clearly a punitive action and was approved by most of the tenured faculty members as a more humane way of dealing with this serious problem. Professor Liebeler did, I believe, at one time suggest that this was precedent for an extended leave for her. I regarded this as ludicrous and insensitive in the extreme. I pointed out that to equate a forced leave at minimal pay with her request for a significant additional period of leave during which she was fully employed was an argument without merit.

I have discussed this issue with other deans and the notion that a professor is entitled to extensive leave as a matter of right is simply not accepted by any American law school. I was under no obligation to grant any leave at all. In any event I did grant her a leave for one full year and a further leave of an additional semester, which she chose not to accept. She had been on leave previously only two years earlier when she worked for the S.E.C.

Professor Liebeler may choose to characterize her resistance to resignation as a fight for "important principles associated with academic tenure" but I believe she merely sought to maintain the security of her tenured position while she pursued other avenues of opportunity.

Sincerely,

Arthur N Frakt

Arthur N. Frakt, Dean

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REPLY TO: P. O. DRAWER D
MONTPELIER, VERMONT 05602

December 2, 1987

Honorable Patrick J. Leahy, Senator
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Re: Susan W. Liebeler Nomination

Dear Patrick:

I have reviewed Susan Liebeler's testimony of August 6, 1987, and her post-hearing submission of November 12, 1987, and discussed both with your special counsel, Steven J. Metalitz. I am writing you at his request to clarify some of her misstatements.

First, you should understand that she never talked to me before the occurences which led to her being charged. Mr. Klein never came to the State's Attorneys office until he was confronted with the situation of his belongings having been removed and the locks changed on his door. Ms. Liebeler's statement that she talked to me before the seizure of his belongings is ridiculous. Mr. Klein came to me when his options were a civil lawsuit to reclaim his belongings for which he had already consulted a private attorney, or the criminal justice process. I knew that if there was a basis for criminal jurisdiction, a search warrant issued in conjunction with charges would accomplish much faster what an injunctive action on the civil side could. At no time was Mr. Klein represented by me. He was a complaining witness that the state used to support its criminal charges against Mr. and Mrs. Liebeler.

Second, Ms. Liebeler's statements that there was never a demand for back rent from Mr. Klein again is ridiculous. The couple seized Mr. Klein's belongings, stored them, changed the locks on Mr. Klein's apartment, and told Mr. Klein that he could get the receipt to claim (and pay for) his belongings after he paid the back rent. That was the crux of the extortion charge.

Ms. Liebeler's discussions with me and offer to pay for Mr. Klein's storage and moving expenses were after the fact. Prior to the suggestion that the State's Attorneys Office was prepared to bring charges, the Liebelers had offered nothing. And in fact, if they had exercised self help to remove Mr. Klein's possessions, but offered to pay moving expenses, and storage expenses, and without ever having demanded the back rent, and if there had been no assault, I am sure I would have exercised prosecutorial discretion in the matter and declined to prosecute.

Ms. Liebeler's recollection seems to have many inconsistencies. Again, in her testimony at page 17 she indicated that she couldn't recall if she had ever seen the written lease, but in her post-hearing submission she says that she reviewed part of it with me. By the way, I have no recollection of being shown any lease by Ms. Liebeler, but certainly would have felt that incorporation of the remedies available under the Vermont Innkeeper's Lien statute into the lease by reference would not allow the Liebelers to do what they had done.

She indicates over and over that she had not researched the law and was not really acting in her capacity as a Vermont lawyer. Her representations to me were exactly to the contrary. She told me she was an admitted attorney in Vermont, had researched the law, and was certain the provisions under which she and her husband had exercised self-help to resolve their landlord-tenant dispute were valid and enforceable.

If there are further questions with regard to apparent conflicts between her representations and mine, or hers and what the documents in the case indicate, please feel free to give me a call. Stay well and give Marcel and the remainder of your family our warmest wishes for a healthy and happy holiday season.

Sincerely,

M. Jerome Diamond, Esq.

MJD/dp